United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

To be argued by
Allen Lashley

75-1196
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 75-1196

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

WILLIAM JOHNSON,

Defendant-Appellant.

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 75-1196

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

WILLIAM JOHNSON,

Defendant-Appellant.

----------X

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The Appellant, WILLIAM JOHNSON, was arrested on Bank Robbery charges on April 24, 1972. On August 1, 1972 he was indicted for violation of Title 18 U.S. Code, Section 2113 (a) (d), 371 and 2.

The trial commenced on October 11, 1974 and ended on October 15, 1974 before Hon. Edward R. Neaher without a jury. On March 11, 1975 Judge Neaher rendered a decision of guilty on Counts 1 and 2 on the Indictment and dismissed Count 3 (the Conspiracy Count).

On May 16, 1975 Judge Neaher sentenced Appellant to a five-year suspended sentence on Count 2 and placed him on five years probation. Count 1 merged into Count 2. The Appellant filed timely Notice of Appeal on May 16, 1975 In Forma Pauperis.

STATEMENT OF FACTS

The Defendant-Appellant, WILLIAM JOHNSON, was arrested in the Eastern District of New York on April 24, 1972 and charged with robbing the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York on February 29, 1972 of approximately $89,000.00. He was arraigned the following day before U. S. Magistrate Catoggio, who assigned Joel Winograd, Esq. to represent the Appellant, at which time bail was set at $25,000.00 surety which Appellant was unable to obtain.

On May 26, 1972 this case appeared on the Calendar of Hon. George Rosling for Waiver of Indictment. Appellant's attorney was not present and Judge Rosling marked the case off his Calendar with an admonition to the U. S. Attorney to have Appellant indicted. (T. 6, 7)*

On June 19, 1972 this case again appeared before Judge Rosling for Waiver of Indictment; however, the

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*Citations to "T" refer to the Transcript of the trial and the preliminary hearings attached hereto.

Assistant U.S. Attorney requested that the matter be marked off and the Government be allowed to proceed to the Grand Jury promptly (T. 3, 4).

On July 28, 1972, with the Appellant still not indicted and having been in custody for more than three months, his case appeared on the Calendar of Hon. Edward R. Neaher for Waiver of Indictment and again the Court was forced to mark the case off its Calendar.

Finally, on August 1, 1972 the Government indicted Appellant for violation of Title 18 U. S. Code, Sections 2113 (a) (d), 371 and 2 and on August 2, 1972, Appellant pleaded not guilty to said Indictment. On this date the Court reduced Appellant's bail to ten-percent cash of his $25,000.00 surety bond. However, no trial date was set and the Government did not communicate either to the Court or Appellant that it was ready for trial.

The next Court proceeding occurred on December 11, 1972 before Judge Neaher without the presence of Appellant or his attorney. The Appellant was still in custody, yet on this date, seven and a half months after the Appellant's arrest, no definite trial date was set. Furthermore, the Government still had failed to communicate to the Court or

Appellant either orally or in writing that it was actually ready for trial (T. 1-6).

This case next came on the Court Calendar before Judge Neaher on January 8, 1973 at which time Joel Winograd, Appellant's attorney requested to be relieved. On January 10, 1973 Judge Neaher appointed Allen Lashley, Esq. as Appellant's counsel and signed an Order sending Appellant to Springfield, Mo. for study and report. As of this date, the Government still had not communicated its readiness for trial and no definite trial date was set, although the defendant was still in custody.

On April 6, 1973 Appellant's attorney prepared and served a motion for Discovery, Inspection and Suppression which was argued before Judge Neaher on April 13, 1973. During said argument, the Government consented to provide Appellant with all written or recorded statements or confessions made by defendant pursuant to Rule 16 (a) of the Federal Rules of Criminal Procedure, including all reports, memorandum or other internal Government documents made by Government Agents concerning statements and admissions of Appellant.

Shortly thereafter the Government turned over to Appellant all such statements except for a statement made by Appellant to Agent Joseph Koletar (Court Exhibit 1).

The basis for Appellant's motion to suppress were statements allegedly made by Appellant to F.B.I. Agents on April 24, 1972, May 1, 1972 and May 3, 1972 and a statement concerning photographs signed by Appellant on May 26, 1972, without his attorney being present on any occasion. In Judge Neaher's decision dated March 11, 1975, the Court held that it based its finding of guilt solely on these confessions.

On May 15, 1973 and May 16, 1973 Judge Neaher conducted "Miranda" Hearings on Appellant's motion to suppress the aforesaid confessions. At this time, Appellant moved to dismiss the Indictment because of the Government's failure to comply with the "speedy trial" rules. Although the Appellant had been in continual custody and unable to raise bail for more than one year, Judge Neaher denied said motion in his Memorandum and Order dated November 23, 1973.

On December 5, 1973 the Court denied Appellant's motion to suppress his statements of April 24, 1972, May 1, 1972 and May 3, 1972, but granted the suppression of the May 26, 1972 statement pertaining to photographs exhibited to Appellant.

During the "Miranda" Suppression Hearing, both Agent Koletar and Appellant testified. Neither of these witnesses

nor any other witness at the Hearing made mention of the interview of May 26, 1972, which is Court Exhibit 1. This three-page document of Agent Koletar dated May 30, 1972 discussed Appellant's alleged narcotic activities and the alleged disposition of the proceeds of the bank robbery, which is the subject of this Indictment.

On October 11, 1974 and October 15, 1974 the trial of this action was held before Judge Neaher without a Jury. Again, Agent Koletar testified on the Government's direct case, but made no mention of the conversation with Appellant concerning narcotics trafficking (Court Exhibit 1). After Agent Koletar's direct examination, the Government still failed to furnish defense counsel with Court Exhibit 1 in compliance with Title 18 U. S. Code, Section 3500. In fact, both defense counsel and Appellant were totally unaware of this three-page statement dated May 30, 1972, which is a synopsis of an interview with the Appellant and Agent Koletar concerning his alleged narcotics activities, his alleged disposition of the bank proceeds, and Appellant's relationship with a "Richie Garbolotto".

At the trial, the Appellant took the stand unaware of the existence of the May 26, 1972 three-page interview in the Government's possession. On direct examination the

Appellant made no reference to participating in narcotics transactions and made no mention as to any of the information contained in the May 26, 1972 interview.

However, on cross-examination over defense counsel's objections, the Assistant U. S. Attorney asked Appellant about his interview with Agent Koletar on May 26, 1972 concerning his involvement with narcotics trafficking (T. 172); also whether Appellant told Agent Koletar if he paid a "Richie Garbolotto" the sum of $12,000.00 that Appellant allegedly received from his share of the proceeds of this bank robbery (T. 173-5).

Then on rebuttal the Government recalled Agent Koletar and again over Appellant's objections, the Government was allowed to question Koletar about the May 26, 1972 interview between Appellant and the Agent relating to Appellant's narcotic activities, his disposition of the bank proceeds, and his association with Garbolotto (T. 185-199). It was at this point that the Government for the first time furnished Appellant with a copy of the F.B.I. three-page Memorandum dated May 30, 1972, which related to Koletar's May 26, 1972 interview with Appellant pertaining to narcotics trafficking.

As indicated in the trial transcript (T. 201-230), the defense never knew of the existence of this F.B.I. Report and

moved to dismiss the Indictment and for a judgment of acquittal.

Judge Neaher reserved decision on Appellant's motion and on March 11, 1975 rendered his decision in which he found Appellant guilty of Counts 1 and 2 of the Indictment while dismissing Count 3 (the Conspiracy Count).

QUESTIONS PRESENTED

(1) Did failure by Government to furnish Appellant with F.B.I. Memorandum of May 26, 1972 interview with Appellant pursuant to Rule 16(a) Federal Rules of Criminal Procedure and Title 18 U. S. Code 3500, require dismissal of Indictment and judgment of acquittal?

(2) Should trial Judge have dismissed Indictment for failure of Government to provide Appellant with "speedy trial"?

ARGUMENT

POINT I

THE FAILURE BY GOVERNMENT TO FURNISH APPELLANT WITH F.B.I. MEMORANDUM OF HIS OWN STATEMENT PURSUANT TO RULE 16 (a) FEDERAL RULES OF CRIMINAL PROCEDURE AND TITLE 18 U. S. CODE 3500 REQUIRED DISMISSAL OF INDICTMENT AND JUDGMENT OF ACQUITTAL.

Rule 16 (a) of the Federal Rules of Criminal Procedure states: "Upon motion of a defendant the Court may order the attorney for the Government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government".

Subdivision (g) of Rule 16 states: "If subsequent to compliance with an Order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the Court of the existence of the additional material. If at any time during the

course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule or with an Order pursuant to this rule, the Court may order such a party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other Order as it deems just under the circumstances."

The law is clear that disclosure is a duty established by Rule 16 providing for Court ordered discovery of written or recorded statements or confessions made by the defendant. United States v. Bryant, 439 F. 2d 642 (1971); United States v. Gleason, 259 F. Supp. 282 SDNY (1966); United States v. Burges, 297 F. Supp. 843 SDNY (1968).

The purpose of this duty of the prosecution to disclose such evidence to the defense is not simply to correct the imbalance of advantage where the prosecution may surprise the defense at trial with new evidence, it is also to make of the trial a search for truth. United States v. Bryant, supra.

It is the duty of the Government to present its case against defendant fairly; a defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to the defense. United States

v. Baum, 482 F. 2d 1325 (2nd Cir., 1973).

In the case at bar, the Appellant moved under Rule 16 by written motion for the inspection and copying of all written or recorded statements or confessions made by the Appellant, WILLIAM JOHNSON. Said motion was argued before Hon. Edward R. Neaher on April 13, 1973. At that time the Government consented to furnish all such statements or confessions to the defendant.

The Government complied with said motion, except that it failed to furnish or reveal to the Appellant or his attorney a three-page statement and confession dated May 30, 1972 as recorded by Agent Joseph W. Koletar in an F.B.I. Memorandum, which is marked Court Exhibit 1. Said statement summarized the interview of Koletar with Appellant on May 26, 1972 concerning Appellant's alleged narcotics trafficking.

In fact, the very first time the defense became aware of the existence of said statement was during the rebuttal testimony of Agent Koletar at the trial on October 15, 1974 even though Koletar testified at the trial on the Government's direct case on October 11, 1974 and at the "Miranda" Hearing on May 15, 1973 and May 16, 1973.

It should be noted that the F.B.I. Memorandum and Interview dated May 30, 1972 deals with the Appellant's alleged narcotics

activities and the disposition of $12,000.00, his alleged "take" from the bank robbery which is the subject of this Indictment.

Appellant submits that the use of the statement in question was highly prejudicial, a complete surprise to the defense and could have affected the Appellant's defense strategy as to whether or not he should have taken the stand.

In a fairly recent Second Circuit case which is exactly in point and which was also tried without a jury, the Court held that where there was wide discrepancy between what defendant claimed at trial and what he had stated after his arrest to police and had defense counsel known the contents of a prior statement, he might have advised defendant not to take the stand, the Government's failure to comply with an Order to furnish a copy of defendant's statement was reversible error. United States v. Padrone, 406 F. 2d 560 (1969).

> We believe that non-compliance with an Order to furnish a copy of a statement made by defendant is so serious and detrimental to the preparation for trial and the defense of serious criminal charges that where it is apparent as here that his defense strategy may have been determined by the failure to comply, there should be a new trial...here it is obvious that there was a wide discrepancy between what the defendant claimed at trial and what he

stated after his arrest. United States v. Padrone, supra p. 561.

Furthermore, in the case at bar, the Government also violated Title 18, U. S. Code 3500 in failing to disclose and turn over to Appellant the F.B.I. Memorandum in question dated May 30, 1972. As previously indicated Agent Koletar testified both at the "Miranda" Hearing and at the trial on the Government's direct case. Yet, the Government failed to comply with "3500" and did not produce or make known to defense counsel the existence of Court Exhibit 1 until Agent Koletar testified on rebuttal on October 15, 1974.

It is to be noted that on cross-examination of the Appellant at the trial, the Assistant U. S. Attorney asked Appellant questions concerning the May 26, 1972 interview relating to his narcotics trafficking (T. 173-5). During said cross-examination, defense counsel had no way of knowing what the Government was referring to by these questions since he was unaware of the existence of the F.B.I. Memorandum in question, and defense counsel was completely surprised by this line of questioning.

Thus, based on the Government's failure to comply with Rule 16 (a) of the Federal Rules of Criminal Procedure and Title 18 U. S. Code 3500, it is submitted that Appellant was seriously prejudiced in his defense and surprised at the trial, which mandated dismissal of the Indictment and/or a judgment of acquittal by the trial judge.

POINT II

THE FAILURE OF GOVERNMENT TO COMMUNICATE ITS READINESS FOR TRIAL FOR A PERIOD LONGER THAN SIX MONTHS FROM DATE OF APPELLANT'S ARREST VIOLATED THE "SPEEDY TRIAL RULES AND REQUIRED A DISMISSAL OF INDICTMENT.

Rule 4 of this Court's Rules Regarding Prompt Disposition of Criminal Cases, effective July 5, 1971 requires that the Government must be ready for trial within six months from the date of arrest of a defendant or the charge shall be dismissed.

Furthermore, where a defendant is in custody during this period of time, the Government must be ready for trial within three months from the date of arrest.

Pursuant to Rule 50 (b) of the Federal Rules of Criminal Procedure, the Second Circuit Rules have been superseded by the local rules of each District Court. Effective April 1, 1973, the Eastern District of New York adopted its Plan for Achieving Prompt Disposition of Criminal Cases. Under Rule 3 of said Plan, the Government must be ready for trial in a case of a defendant in custody within three months from the date of arrest and the Government must communicate its readiness for trial within said period.

The Appellant herein was arrested on April 24, 1972 and remained in custody unable to raise bail until May 17, 1973, a period exceeding one year.

The Government did not indict Appellant until August 1, 1972, more than three months after his arrest. The trial herein took place on October 11, 1974 and October 15, 1974, some two and one-half years after Appellant's arrest.

It is submitted that the Government never in fact communicated its readiness for trial to the Court or Appellant either orally or in writing. In fact, the only discussion concerning a trial date occurred before Judge Neaher on December 11, 1972, some seven and one-half months after Appellant's arrest, at a time when neither Appellant nor his attorney were present in Court. (T. 1-6).

On May 15, 1973, Appellant's attorney moved to dismiss the Indictment based on the Government's failure to comply with the "speedy trial" rules. On November 23, 1973 Judge Neaher denied said motion in his Memorandum and Order.

Appellant submits that the two and one-half year delay between arrest and trial and the Government's failure to clearly communicate its readiness for trial violated both this Court's Rules Regarding Prompt Disposition of Criminal

Cases and the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases and the delay by the Government did not satisfy any of the "exceptional circumstances" of Rule 5. In fact, the Government failed to transmit formal or informal notice that it was ready for trial to the District Court or Appellant prior to the trial. United States v. Scafo, 480 F. 2d 1312 (2nd Cir., 1973); cert. den. 414 U. S. 1012; United States v. Pierro, 478 F. 2d 386 (2nd Cir., 1973); Hilbert v. Dooling, 476 F. 2d 355 (2nd Cir., 1973); United States v. Favaloro, 493 F. 2d 623 (2nd Cir., 1974).

It is equally clear that the delay in the case at bar also violated Appellant's Sixth Amendment Rights to a "speedy trial" as outlined by the United States Supreme Court in Barker v. Wingo, 407 U. S. 514 (1972).

Thus, the trial Court committed reversible error in denying Appellant's "speedy trial" motion to dismiss the Indictment.

CONCLUSION

COUNTS 1 AND 2 OF THE INDICTMENT SHOULD BE DISMISSED OR IN THE ALTERNATIVE A JUDGMENT OF ACQUITTAL ENTERED.

Respectfully submitted,

ALLEN LASHLEY
Attorney for Defendant-Appellant

72CR-297 & 72CR-338 relate.

D. C. Form No. 100

CRIMINAL DOCKET 72CR 921

NEAHER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	
WILLIAM JOHNSON	
	For Defendant: ALLEN LASHLEY
	16 Court St., Bklyn, N.Y.
	(8731133)
Bank robbery.	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBURSED
Fine,							
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
8-1-72	Before DOOLING, J. - Indictment filed.
8-2-72	Before NEAHER, J - Case called - Deft & counsel Joel Winograd present - deft arraigned & enters a plea of not guilty - on application of counsel for deft bail reduced as follows: $25,000 personal bond with 10% cash.
12/11/72	Before NEAHER, J.- Case called- Adjd to 1/8/73 at 11:00 A.M.
1/8/73	Before NEAHER, J. - Case called-Deft and counsel present-Mr. Winograd moves to be relieved as deft's counsel-Decision reserved-Case cont'd to 1/10/73.
1/10/73	Before NEAHER, J.- Case called- Deft and counsel present-Mr. Winograd's motion to be relieved as counsel is granted-Mr. Alan Laskley appointed as counsel -Order to be submitted for study and report.

72CR 921

DATE	PROCEEDINGS
[illegible]	[illegible]
[illegible]	[illegible]
1-22-73	By NEAHER, J - Order filed that deft WILLIAM C. JOHNSON be committed to the Medical Center for Federal Prisoners at Springfield, Mo. to determine his mental capacity to stand trial, etc. for a period not to exceed 30 days, and that copies of said report be sent to U.S. Atty. and counsel for deft Allan Lashley, esq. and further ordered the deft, if sane, shall be returned to the custody of the U.S.Marshal. Copies to Marshal.
2/14/73	Copy of Order retd and filed/Executed.
[illegible]	Notice of motion for discovery and inspection filed
[illegible]	Before NEAHER, J.- Case called- Deft's motion to inspect and copy etc. argued-Motion granted and denied as indicated-Set for trial 5/7/73
[illegible]	Before NEAHER, J.- Case called- Adjd to 5/14/73
5-14-73	Before Neaher, J - Case called - Deft & counsel Allan Lashley present - adjd to May 15, 1973 for Trial.
5-15-73	Before Neaher, J - Case called - Deft & counsel present - defts motion to dismiss for lack of speedy trial - Motion to suppress ordered and begun - Hearing held and continued to May 16, 1973.
5/16/73	Before NEAHER, J.- Case called- Hearing resumed-Deft JOHNSON (W.)'s motion to reduced bail-Motion granted on consent -Bail set at $5,000.00, 10per cent cash-Hearing held and cont'd to 5/21/73
5-17-73	Before Neaher, J - Case called - adjd to May21, 1973(for Trial)
5/17/73	By CATOGGIO, MAG. - Order for Acceptance of Cash Bail filed.
5/17/73	Stenographer's transcripts of 12/11/73 filed.
5-24-73	Stenographers transcript of 7-28-72 filed.
5-24-73	Stenographers transcript of 6-19-72 filed.
5/25/73	Stenographer's transcript of 5/26/72 filed.
5-29-73	Before Neaher, J - adjd without date for Trial -
5/29/73	Stenographer's transcript of 1/10/73 filed.
5/[illegible]/73	Voucher for Expert Services filed (Dr. JOHNSON)
11-28-73	By NEAHER,J.- Memorandum and Order filed denying deft's motion to dismiss the indictment (copies sent to A.U.S.A. Pattison and Allan Lashley, esq)

CRIMINAL DOCKET

DATE	PROCEEDINGS
12-4-73	By NEAHER, J - Memorandum and Order filed on motion by the defi for suppression , etc. 1)deft was fully warned of his rights 2)Govt and deft understood those warnings; 2) deft has fully, voluntarily and intelligently waived those rights on 4-24-72; 3) deft & counsel clearly knowingly , explicitly and voluntaril waives any rights with respect to the meetings on May 1 and 3 but not with respect to that of May 26. Accordingly the Court grants defts motion as to the May 26 interview, but denies it i all other respects.
12-13-73	Before NEAHER,J.- Case called- Adjd to 1-3-74 at 9:45 A.M.
1-3-74	Before NEAHER, J - Case called - set down for Trial 4-22-74.
4-22-74	Before NEAHER, J - case called - deft & counsel present - adjd to Aug. 20, 1974 at 10:00 am for trial
8/20/74	Before Weinfeld,J.- Case called- Hearing held and counsel ordered decision.
9/17/74	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
9/17/74	By NEAHER,J.- Writ issued, Det. 9/23/74 (WILLIAM C. KEARON)
9-23-74	Before NEAHER,J.- Case called- Deft not present- counsel prese warrant ordered- bench warrant stayed without date
10-7-74	Before NEAHER, J - case called - deft & counsel Allan Ashley present - adjd without date (for trial)
10/11/74	Before NEAHER,J.- Case called- Deft and counsel present- Trial and begun-Waiver of Jury trial signed- Trial contd to 10/15/74 at A.M.
10/11/74	Waiver of Jury trial filed
10/15/74	Before NEAHER,J.- Case called- Deft and counsel present- Trial re Govt rests- Motion by govt to dismiss indictment - decision reser Motion by deft for judgment of acquittal- decision reserved- on m that testimonyof one agent be stricken, etc.- decision reserved- concluded- Court reserved decision- Both sides to submit briefs 2 weeks
10-17-74	Voucher for Expert Services filed.
10/25/74	Deft's memorandum of law filed
11-12-74	Govts Memorandum of Law filed.
3/31/75	Before NEAHER,J.- Case called- Deft and counsel present-Court re decision and found deft guilty on counts 1 and 2- count 3 is dism Deft contd on bail- sentence adjd without date

DATE	PROCEEDINGS
3-11-7	By HEATH, J - Memorandum of Decision and Order filed -deft found guilty by the Court on counts one and two of the indictment - counts three is dismissed.
-16-75	Before HEATH, J - case called - deft & counsel Allen Ashley present - deft sentenced to 5 years imprisonment - execution of sentence suspended and deft is placed on probation for 5 years Special conditions of probation are that the deft remain permanently and steadily employed, remain out of trouble and undergo drug treatment as required by the Probation Dept. Deft informed of his right to appeal.
5-16-75	Judgment and Order of Probation filed - certified copies to Probation
5-16-	Notice of Appeal filed (no fee)
5-16-	Motion entered and duplicate copy of Notice of Appeal was ordered to be Court of Appeals together with Forms A & B.
/22/75	Certified copy of Order read and filed from the C. of A. that the Record docketed on or before 6/2/75.
5/23/75	Stenographers Transcripts dated 8/2/72, 1/3/73, 5/15/73, 5/16/73, 5/29/73 10/11/74 and 10/15/74 filed

EJB:TRP:cd
F#723085

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

-against-

WILLIAM JOHNSON,

Defendant.

- - - - - - - - - - - - - - - - - - -X

INDICTMENT

Cr. No. 72 CR 921
(T. 18 USC §2113(a) (d)
T. 18 USC §371
T. 18 USC §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 29th day of February 1972, within the Eastern District of New York, the defendant WILLIAM JOHNSON, by force, violence and intimidation, did take from the person and presence of employees of the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York, approximately Eighty-Nine Thousand Dollars ($89,000.00) in United States currency, which money was in the care, custody, control, management and possession of said bank, the deposits of which being then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code §2113(a) and §2).

COUNT TWO

On or about the 29th day of February 1972, within the Eastern District of New York, the defendant WILLIAM JOHNSON, by force, violence and intimidation, did take from the person and presence of employees of the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York, approximately Eighty-Nine Thousand Dollars ($89,000.00) in United States currency, which money was in the care, custody, control, management and possession of said bank, the deposits of which being then and there insured by the Federal Deposit Insurance Corporation, and in the commission of said act and offense the defendant WILLIAM JOHNSON did

assault and place in jeopardy the lives of the aforementioned employees through the use of dangerous and deadly weapons, to wit: handguns. (Title 18 United States Code §2113(d) and §2).

COUNT THREE

On or about and between the 17th day of January 1972 and the 29th day of February 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant WILLIAM JOHNSON, together with Jeffrey Bonner, Richard Raymond Jenkins, Edward Davis, Earl Rozier, Marvin Cecil Barry, Randolph Randy Russell and Samuel Mc Duffie, named as co-conspirators but not indicted herein, did knowingly conspire to commit an offense against the United States of America in violation of Title 18 United States Code, §2113(a), by conspiring to take by force, violence and intimidation from the person and presence of employees of the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York, a quantity of United States currency and other things of value which were in the care, custody, control, management and possession of said bank, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code §371).

In furtherance of the said conspiracy, and to effectuate the objects thereof, the defendant WILLIAM JOHNSON committed the following

OVERT ACTS

1. The Grand Jury repeats and realleges as though fully contained herein each and every allegation in Counts one and two.

A TRUE BILL.

_____
FOREMAN.

_____
UNITED STATES ATTORNEY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	72 CR 921
-against-	MEMORANDUM AND ORDER
WILLIAM JOHNSON,	
Defendant.	

APPEARANCES:

ROBERT A. MORSE, ESQ.
United States Attorney,
Eastern District of New York
By THOMAS R. PATTISON, ESQ.
Assistant U. S. Attorney

ALLEN LASHLEY, ESQ.,
Attorney for Defendant

MEAHER, District Judge.

Defendant, William Johnson, has moved to dismiss this action for failure to provide him with a speedy trial. For the reasons which follow, defendant's motion is denied.

At the time of argument, the court deferred an evidentiary hearing on the application pending the preparation of transcripts of prior proceedings which would enable the court to review the record and determine whether an evidentiary hearing was necessary. At the same

time, the court held an evidentiary hearing upon a pending motion to suppress statements and property obtained from defendant. While that hearing dealt primarily with the suppression motion, some evidence relevant to the speedy trial question was in fact adduced in the course of testimony by defendant and Joel Winograd, Esq., his former attorney.[1]

The court's examination of the transcripts of prior proceedings, as well as its own records, establishes the following incontrovertible facts:

Defendant was arrested on April 24, 1972 in connection with an armed robbery of the Kings Lafayette Bank in Brooklyn which took place on February 29, 1972. He was arraigned the following day, and United States Magistrate Catoggio appointed Mr. Winograd to represent him as assigned counsel and set bail in the amount of $25,000 surety. Defendant was unable to make bail and remained in custody until subsequently released as hereinafter noted.

Defendant first appeared before the court (the late Judge Rosling) on May 29, 1972. The matter had

apparently been set down for a waiver of indictment. However, defendant expressed the belief that his counsel had been appointed by the FBI, stated that he had never met with his counsel prior to that day and declared that he did not desire to be represented by anyone. Consequently, the case was marked off, as no waiver could be accepted under the circumstances.

The case was next scheduled for June 19, 1972, again for waiver of indictment. At that time the Assistant United States Attorney, Thomas R. Pattison, requested that the matter be marked off, as there would not be a waiver. Judge Rosling granted the request.

The case having meanwhile been reassigned to the writer, the matter was next before the court on July 28, 1972. The government prosecutor stated that the case was to have been on for a waiver and plea, but that he had just been informed there would be no plea. He asked for leave to go to the grand jury the following Tuesday, August 1, 1972. He further asserted that the case had not as yet been presented to the grand jury, because the government had been told "many times" that there would be a plea. This statement was disputed to some extent by

both defendant and his counsel. Nevertheless, neither defendant nor his counsel disputed the prosecutor's statement that they had been engaged in plea discussions (Transcript, July 28, 1972, pp. 15-16).

Defendant, through counsel, also at this appearance requested a reduction in bail. The court deferred decision on the application until August 2, 1972.

On August 2, an indictment having been returned, defendant pled not guilty. The court granted defendant's application for reduction in bail, and fixed bail at $25,000 personal surety (10% cash) to be signed by a member of defendant's family, an amount in which defendant's counsel fully concurred. The court thereupon inquired whether Mr. Winograd was ready to proceed to trial. He replied he could not be ready within two or three weeks, although he could be prepared within a month or two. The following exchange thereupon ensued:

> "THE COURT: If you are not ready in two, three weeks, I think you had better engage in the usual exchange of information if you have not done that already.
>
> "MR. WINOGRAD: We have not.
>
> "THE COURT: And we will talk about a trial date after Labor Day.

"MR. WINOGRAD: That is agreeable to the defendant.

"MR. PATTISON: Fine, your Honor."

While the court had been led to believe that defendant could make bail in the reduced amount and would thus be enlarged, apparently this was not done.

The court's records indicate that on October 25, 1973, a trial date was set for December 11, 1972 and that counsel were notified. Mr. Winograd did not appear on that day, apparently because he was then engaged on another trial. However, the government prosecutor indicated he was ready to proceed to trial (Tr., December 11, 1972, pp. 4-5). A new trial date was set for January 8, 1973.

On January 8, Mr. Winograd applied to the court to be relieved as counsel. He confirmed at that time the Assistant's previous statements as to the prior plea negotiations, and that plea was in fact to have been entered upon an information (Tr., January 8, 1973, p. 4). He further stated he could no longer represent defendant due to personal and philosophical differences.

The court then engaged in an extensive discussion

with the defendant. The defendant insisted that he did not wish the assistance of counsel and indicated he would conduct the trial himself (id., pp. 7-16). After Mr. Winograd asserted he would be unable to assist defendant at trial due to the previously mentioned conflicts, the court questioned the prosecutor as to the government's position under the circumstances. Mr. Pattison expressed the fear that no proper trial could be held without some counsel assisting defendant (id., pp. 17-18).

The court concurred in this conclusion, and asked defendant if he had any objection to the court's consulting with defendant's brother, an employee of the Appellate Division in Brooklyn, in an effort to obtain counsel to assist him. Defendant stated that he had no objection (id., pp. 18-21).

Mr. Winograd thereupon requested the court to ord order the government to provide defendant with necessary dental work. The court requested that a written order be submitted and adjourned the case until January 10, 1973.

In the interim the court consulted defendant's brother and through him contacted Allen Lashley, Esq.,

who agreed to assist defendant at trial. On January 10, 1973, the court appointed Mr. Lashley to serve as counsel for defendant on that basis, and granted Mr. Winograd's application to be relieved as counsel. The court signed an order requiring the government to provide defendant with dental services. Finally, in order to resolve doubts in the court's mind as to his ability to stand trial, the court sua sponte directed defendant to submit to medical examination for study and report, adjourning defendant's trial 45 days pending a report. The court again asked that an order be prepared. This order was signed on January 22, 1973. Defendant was thereupon transferred to Springfield, Missouri, for the examination.

On March 23, 1973 the court received the psychiatric report, which concluded that defendant was competent. Counsel were informed by letter that the court intended to set a trial date following defendant's return to New York.

On April 6, 1973 the court received a notice of motion by Mr. Lashley requesting a bill of particulars, discovery and the suppression of evidence. The motion was heard on April 13, 1973 and a trial date was set for May

7, 1973, subsequently adjourned to May 15, 1973.

On May 15, 1973, Mr. Lashley made a motion for the first time in this case to dismiss the indictment for failure to comply with the speedy trial rules. As of that date, the court became aware that defendant was still in custody after his return from Springfield. He was released on May 17, 1973 according to the records of the U. S. Marshals.

Under Rule 3 of the Eastern District's "Plan for Achieving Prompt Disposition of Criminal Cases" ("the Plan"), promulgated pursuant to F.R.Crim.P. 50(b) and made effective April 1, 1973,[2] the government must be ready for trial of a detained defendant within three months from the date of detention. The government must communicate its readiness for trial in some fashion within the three-month period, as extended pursuant to Rule 5.[3] Cf. United States v. Scafo, 480 F.2d 1312, 1318 (2 Cir. 1973), citing United States v. Pierro, 478 F.2d 386, 389 (2 Cir. 1973). The preferred method is the filing of a written notice of readiness; however, an oral notice of readiness to the court and to the defendant is also accepted. United States v. Pierro, supra at 389 n. 3. The mere obtaining of a

delayed indictment is not necessarily an indication that the government is ready for trial within the meaning of Rule 3. Cf. United States v. Scafo, supra at 1318.

Although defendant made his speedy trial motion on May 15, 1973, the time period in question involves at most a seven and one-half month period from April 24, the date of defendant's arrest, to December 11, 1972 when the government flatly indicated to the court its readiness for trial on the record.[4]

The transcripts of defendant's court proceedings make clear that

(1) between April 24, 1972 and July 28, 1972 plea negotiations were going on premised on defendant's proposed waiver of an indictment, and involving the possibility of NARA treatment for him. The existence of these negotiations was confirmed by Mr. Winograd on January 8, 1973 and May 16, 1973.

However, defendant apparently contends that Winograd did not adequately represent him and that he should not be bound by Winograd's affirmation.

The court sees no occasion to rule on the

question of whether a defendant can be bound by the actions of an attorney who the defendant does not wish to have as counsel.

Defendant's own testimony on May 16, 1973 clearly indicated that he had in fact negotiated with the government, that he was going along with the government and "playing games" with it (Tr., May 16, 1973, p. 205) until the birth of a child expected by his wife. And that he stated in June 1972 that he might be a witness for the government, if he was allowed to talk to his wife (Id., p. 207). This occasioned the government's delay in seeking an indictment against defendant until August 2, 1972.

(2) July 28 - August 2, 1972. The court deferred decision on defendant's motion to reduce bail to allow the government the opportunity to the government to seek an indictment against him.

(3) August 2 - December 11, 1972. Having granted a motion to reduce bail which Winograd and defendant led the court to believe could and would be met, the court with their consent or acquiescence adjourned fixing a trial date until after Labor Day. Neither Winograd nor

defendant ever formally requested an immediate trial date. The court, being under the impression that defendant was no longer incarcerated and, due to the waiver of an immediate trial on August 2, 1972, did not set such a date until October 25, 1972, when it scheduled a trial on December 11, 1972.

Assuming defendant is bound by the representation of Mr. Winograd, this delay may be attributed to him. Assuming defendant must not be bound because of his subjective feelings and attitudes toward Winograd, he is bound by his own inactivity. It was up to defendant to apprise the court that Winograd was not his counsel and that he was insistent on a speedy trial despite the earlier waiver in court by Winograd and himself.[5]

In sum the court concludes that there is no doubt that any and all delay in this case between April 24, 1972 and December 11, 1972 was excusable, having resulted from defendant's gamesmanship and consent. Negotiations with the government concerning cooperation by the defendant as well as a disposition by plea constitutes an exceptional circumstance under Rule 5(h), and the period of time in which such negotiations occurred is

excluded from the computation of time specified in Rule 3. Cf. United States v. Valot, 381 F.2d 22, 24-25 (2 Cir. 1973). The consent to a two-month adjournment (and only then for the setting of a trial date) constitutes an excluded period under Rule 5(b). Hence the government was indeed ready for trial within the relevant period under Rule 3 of the Plan, as extended by Rule 5.[6]

The court also notes that defendant's bail was in fact reduced on August 2, 1972, to a figure which it was claimed defendant could meet. This reduction would have complied with the mandates of Rule 3, in the event the government had not been ready for trial within the applicable period. Rule 3 does not on its face require dismissal of an action for the government's failure to be ready, see n. 3 supra.

Finally, since the government was ready for trial under the relevant period in Rule 3, it was ready for trial a fortiori within the applicable period under Rule 4.[7]

Accordingly, defendant's motion to dismiss the indictment is denied.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, N.Y.
November 23, 1973

FOOTNOTES

[1] In the course of this hearing on May 15 and 16, the court in limiting testimony to the suppression motion made reference to a future hearing on the speedy trial motion. Such statements were impliedly conditioned upon a ruling that an evidentiary hearing was required.

[2] Rule 3 of the Plan provides:

> "3. Detained defendants: Trial readiness and effect of non-compliance.
>
> "In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release."

This rule is identical to Rule 3 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases which went into effect on July 5, 1971 and were superseded on April 1, 1973 by the Plan.

[3] Rule 5 contains a number of periods which should be excluded "[i]n computing the time within which the government should be ready for trial under rules 3 and 4. . . ."

4 While December 11, 1972 is the first date that the government's readiness was formally conveyed to the court, it is quite possible that such notice was provided at an earlier time informally. However, in view of the court's findings herein, it sees no need to take evidence on this possibility.

5 The court further notes that the delays in this case subsequent to the government's notice of readiness were occasioned as follows:

> (1) On December 11, 1972, a trial date was set for January 8, 1973 — due to the engagements of the court and government prosecutor, and defendant's counsel.
>
> (2) January 8 to January 10, 1973 due to the substitution of counsel.
>
> (3) January 10, 1973 to April 1973, due to the transfer of defendant for examination by order of the court.
>
> (4) April 1973 to May 15, 1973 due to prior engagements and adjournments on consent.
>
> (5) May 15, 1973 to present, due to these pending motions occasioned by the court's awaiting various submissions and the press of other court business.

6 The court interprets the Plan as not requiring that the government move for a 5(h) extension of the three-month period prior to the extension of the period. Cf. United States v. Rollins, 475 F.2d 1108 (2 Cir. 1973). Although Rollins involved a claim under the former Rule 4 of the Second Circuit Speedy Trial Rules, and although the court noted that the new Rule 4 specifically dispensed with requiring a prior motion for an extension, the court believes that the reasoning in Rollins compels its conclusion that such a motion is not required under Rule 3.

Moreover, in the circumstances of this case, where the exceptional circumstance occasioning the delay was defendant's gamesmanship, the court believes that defendant should be estopped from relying on any failure to request an extension prior to expiration of the period.

As previously indicated, the delay after August 2, 1972, excluded under 5(b), resulted from a continuance granted at the request of or with the consent of the defendant, or his attorney.

[7] See n. 3 supra.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA : 72 CR 921

-against- :

WILLIAM JOHNSON, : MEMORANDUM AND ORDER

Defendant. :

- - - - - - - - - - - - - - - - - - -x

APPEARANCES:

ROBERT A. MORSE, ESQ.
United States Attorney,
Eastern District of New York
By THOMAS R. PATTISON, ESQ.
Assistant U. S. Attorney

ALLEN LASHLEY, ESQ.,
Attorney for Defendant

NEAHER, District Judge.

Defendant William Johnson, charged with armed bank robbery of the Kings Lafayette Bank on February 29, 1972, has moved in general terms to suppress statements and property "illegally taken and seized by the United States." No papers were filed specifically delineating the legal theories underlying defendant's motion, but at the evidentiary hearing, referred to as a Miranda hearing by defense counsel, allegations of the denial of

defendant's fifth and sixth amendment rights were asserted. After careful review of the evidence adduced, the court is convinced that defendant's fifth and sixth amendment rights were not violated and that no basis exists for suppressing statements he made to law enforcement officers following his indictment, except as hereinafter indicated.

Testimony was heard from four witnesses: former New York City Detective Robert J. Killie (now with the Bureau of Customs), FBI Special Agent Joseph W. Koletar, Joel Winograd, Esq., defendant's former counsel, and the defendant himself.

The court notes at the outset that it found the officers' testimony totally credible. By contrast, the court disbelieved the defendant in most respects, finding much of his testimony illogical, unconvincing, and clearly at odds with his high degree of intelligence.

The evidentiary hearing revealed the following:

On April 24, 1972, at approximately 1:00 p.m., Detective Killie and Agent Koletar, together with Detective Hodgson went to 898 Saratoga Avenue in Brooklyn and knocked on a door on the second floor. Defendant

opened the door and Killie identified himself. Defendant stated, "I've been expecting you." Detective Hodgson then read a printed statement of rights form to defendant. Killie asked defendant to accompany the officers to the 11th District Robbery Squad Office in the 76th Precinct. Defendant agreed to do so.

At the squad office, defendant was again read a statement of rights form by Agent Koletar. Defendant read the form himself. At 2:04 p.m. defendant stated that he fully understood his rights, was willing to be interviewed, but declined to sign the form.

Agent Koletar interviewed defendant for approximately two hours. Johnson agreed to give a written statement, and was again read a written statement of rights. At 4:43 p.m. defendant read the form himself and signed it.

Agent Koletar took and transcribed a formal statement from defendant, at the end of which defendant wrote a paragraph dictated by Koletar that he was giving "a free and voluntary" statement to Koletar. He signed the statement at approximately 6:00 p.m.

In the course of the interview on April 24, sometime between 3:00 p.m. and 4:40 p.m. defendant was allowed to make a telephone call.

Defendant was then brought to the New York Office of the FBI for processing and subsequently taken to the Federal House of Detention.

During the course of defendant's interview he was neither threatened, coerced, induced, or tricked into answering questions, signing a statement or waiving his rights. Defendant was not under any mental disability. The court specifically rejects defendant's testimony that he was under the influence of drugs at the times in question.

The next day, April 25, 1972, following defendant's arraignment before United States Magistrate Catoggio, Agent Koletar conferred with Joel Winograd, Esq., counsel appointed for defendant by the Magistrate. After informing Winograd of defendant's "cooperative attitude," Koletar requested Winograd's permission to further interview the defendant. Winograd agreed and said that there was no need for him to be present.[1]

Koletar interviewed defendant on May 1, 1972 in the Marshal's office of this courthouse. Koletar read to defendant and presented to him an interrogation and advice of rights form. Defendant stated he understood that he was going to be interviewed and signed the form. At this meeting defendant was shown six photographs of other suspected participants in the bank robbery and made an identification of one of them. Defendant also signed a statement at that time. Mr. Winograd unquestionably was aware of this interview, since he admitted to receiving one or two calls from Assistant U. S. Attorney Pattison concerning such meetings.

Defendant was transported on May 3, 1972 to the Bureau of Criminal Identification of the N.Y.C.P.D. under a court order to view mug shots and photographs. He was shown six photographs of women, one of which he identified. He signed the reverse side of the photograph, as well as a short written statement. Mr. Winograd had specifically discussed this meeting with Mr. Pattison.

Another interview was held in this courthouse with defendant on May 26, 1972, without his counsel. Agent Koletar explained to defendant the purpose of the

interview and orally advised him of his rights. Defendant stated that he understood his rights and was willing to proceed. He was again shown six photographs, one of which he identified. He signed a statement concerning the identification.

Defendant apparently contends that an interview with a defendant who has counsel in the absence of that counsel is per se violative of the defendant's constitutional rights, evidently relying on the principles of Massiah v. United States, 377 U.S. 201 (1964).

There is some authority for the view that the Massiah protection cannot be waived, see, e.g., United States v. Massimo, 432 F.2d 324, 327 (2 Cir.) (Friendly, C.J. dissenting), cert. denied, 400 U.S. 1022 (1971). However, the Court of Appeals in this Circuit has never extended Massiah to this extent. Id. at 327 n. 1; United States ex rel. Lopez v. Zelker, 344 F.Supp. 1050, 1054 (S.D.N.Y.), cert. denied, 409 U.S. 1049 (1972).

In Lopez, Judge Frankel assumed that Massiah protection might be waived but found a waiver lacking. He concluded that a

> casual and relatively perfunctory invitation to a Miranda-style waiver is insufficient. When an indictment has come down, riveting tightly the critical right to counsel, a waiver of that right requires the clearest and most explicit explanation and understanding of what is being given up. Lopez, supra at 1054.

Here, it is clear that there was a reasoned waiver by both defendant and his counsel to any rights to have counsel present or to remain silent, at least as to the interviews on May 1 and 3. Compare United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972). However, the court is unable to find a clear waiver concerning the interview of May 26, 1973, despite some supportive evidence.

The purpose of the waiver by defendant and his counsel was to improve defendant's position in relation to a possible disposition of the charges against him. Cf. Richardson v. McMann, 340 F.Supp. 136 (S.D.N.Y. 1971). And this purpose which was manifest throughout the period in controversy cannot be altered after the fact by claims of defendant that he was only playing games with the authorities.

Massiah was aimed at situations where law

enforcement authorities have deliberately elicited incriminating statements from a defendant by direct interrogation or by surreptitious means. It is clear to the court that Massiah was not aimed at a situation where a defendant and his counsel cooperate with law enforcement officials in the hope of a favorable disposition. Further, while the identifications and statements may have been incriminatory as to defendant, they were essentially sought by law enforcement officers investigating the participation of others in the activity alleged to have been committed by defendant.

In sum, the court concludes that:

(1) defendant was fully and repeatedly warned of his Miranda rights and defendant understood those warnings;

(2) defendant knowingly, voluntarily and intelligently waived those rights on April 24, 1972;

(3) defendant and his counsel clearly, knowingly, explicitly, and voluntarily waived any rights with respect to the meetings on

May 1 and 3, but not with respect to that of May 26.

Accordingly, the court grants defendant's motion as to the May 26 interview, but denies it in all other respects.

So ordered.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, N.Y.
December 5, 1973

FOOTNOTES

[1] As to post-arrest interviews, Mr. Winograd, defendant's counsel, stated that following the arraignment he had spoken with the Assistant U.S. Attorney, Thomas Pattison, or with the FBI agent, authorizing them to speak to defendant concerning possible cooperation. He further recalled having specifically discussed defendant's being brought on May 3 to the Bureau of Criminal Identification to look at mug shots. He also said he had told Mr. Pattison that there was no need for him to be present at an interview with defendant. He was aware of "at least two and maybe three contacts" with defendant. He referred to a telephone call from Mr. Pattison on one or two of those occasions. Consequently, Mr. Winograd admitted giving permission on April 25 for the May 1 meeting and also for the May 3 interview.

Mr. Winograd further acknowledged that he expected interviews with the defendant might extend over a period of several weeks.

The court concludes that Mr. Winograd gave specific authorization for the May 1 and May 3 interviews, but that there was no explicit permission for that of May 26, despite possible inferences to the contrary.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-against- :

WILLIAM JOHNSON, :

Defendant. :

- - - - - - - - - - - - - - - - - -x

72 CR 921

MEMORANDUM
OF
DECISION

APPEARANCES:

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
By THOMAS R. PATTISON, ESQ.
Assistant U.S. Attorney

ALLEN LASHLEY, ESQ.
Attorney for Defendant

NEAHER, District Judge.

The defendant, William Johnson, having waived trial by jury, was tried by the court on an indictment charging him alone with bank robbery in two counts. 18 U.S.C. §§2113(a) and (d) and §2.[1] It was stipulated as fact at the outset, in lieu of witnesses to be called by the government, that on February 29, 1972, the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York, was

robbed of approximately $89,000 by five armed males, the bank's deposits being then insured by the Federal Deposit Insurance Corporation. It was also stipulated that there were no eyewitness identifications of the defendant as one of the bank robbers. The crucial question to be determined at trial was whether defendant had confessed his participation in the robbery beyond a reasonable doubt by voluntary statements made to the officers who had arrested him.

The government's evidence, aside from the stipulation of facts, consisted solely of the testimony of the arresting officers and certain documents and photographs bearing defendant's signature and other writing by him.[2] In summary, that evidence, if fully credited, established the following facts:

On April 24, 1972, prior to 2:00 p.m., F.B.I. Special Agent Joseph Koletar, accompanied by New York City Detectives Richard Hodgson and Robert Killie, went to defendant's apartment at 898 Saratoga Avenue in Brooklyn to place him under arrest. In response to their knock, defendant opened the door and, after the officers identified themselves, indicated he was expecting them. After being

informed of his rights, defendant accompanied the officers to the 76th police precinct. There he was again advised of his rights and stated his willingness to talk to Agent Koletar about the Kings Lafayette Bank robbery, although declining to sign the waiver of rights included in a standard F.B.I. "Interrogation: Advice of Rights" form presented to him. Then for one and a half to two hours he gave a detailed narration of the bank robbery.

With defendant's agreement, his verbal statement was reduced to written form by Agent Koletar and signed by defendant, at which time he also agreed to sign the "Interrogation: Advice of Rights" form and did so. In that statement dated "4/24/72," time "4:40 P.M.," Government's Exh. 3, the defendant admitted:

> "I helped rob the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York on February 29, 1972. My job in the robbery was to stand guard over bank employees at the front of the bank. During the robbery I held my hand in my pocket as if I had a gun. A money shipment in a canvas bag was taken from the bank.
>
> "Later the same day, I received about $12,000.00 in United States currency for my part in the robbery, this money having come from the bank."

Although the entire statement was in Agent Koletar's handwriting, it concluded with a statement and signature

admittedly in defendant's handwriting, which read:

> "I have read this statement, consisting of this and one other page, which I have initialed, and it is true and correct."

The four succeeding pages of Government's Exh. 3, also in Koletar's handwriting, recite the details of the planning and execution of the bank robbery, the names of the other participants, their activities in the bank, and the manner of the getaway and distribution of the loot. Identified by defendant as other participants in the robbery were Mervin Cecil Barry, Edward Davis, Jeffrey Patrick Bonner, Randy Russell and Earl Rozier, who remained outside as lookout with the then unidentified driver of the getaway car.[3] This portion of the statement was also concluded by a sentence in defendant's clearly written handwriting, acknowledging that it was "true and correct," followed by his signature.

During the interview, at about 3:00 p.m., defendant was permitted to and did make a telephone call. Throughout the interview defendant was cooperative, was able to read and write, spoke without slurred speech and exhibited no needle marks or other evidence of recent drug

intake. At no time was he threatened or coerced. At the conclusion of the interview about 6:00 p.m., he was taken by the arresting officers to F.B.I. headquarters in Manhattan where he went through the usual processing, after which he was lodged at the Federal Detention Center.

On the next morning, April 25, 1972, defendant was arraigned before a United States Magistrate who assigned Joel Winograd, Esq., to represent him. In defendant's presence, Agent Koletar at that time informed Winograd of the defendant's cooperation of the day before and obtained Winograd's consent to the officers' seeing defendant "in the future" for the purpose of showing him photographs to further identify members of the bank robbery group.

On May 1, 1972, pursuant to the foregoing arrangement, Agent Koletar and Detective Hodgson met with defendant in the detention room in this courthouse. On that occasion, in the absence of his counsel, defendant signed an "Interrogation: Advice of Rights" form including a waiver of rights. Government's Exh. 4. He was shown a group of six photographs from which he selected one, placing his signature and the date "1 May 1972" on the back. Government's

Exh. 5. Defendant did not know the man's name but identified him as being present in the Davis apartment when the bank loot was split up. After being informed that the man was Virgil Lee Woods, defendant signed a statement admitting that Woods had observed defendant receiving his share and that he gave Woods several hundred dollars from that share when Woods asked for it. Government's Exh. 8.

Two days later, on May 3, 1972, defendant was taken by Agent Koletar and Detective Hodgson to the Bureau of Criminal Identification of the New York City Police Department for the purpose of attempting to identify the driver of the getaway car. After examining numerous photographs defendant was unable to make a definite identification. On that occasion he was also shown a group of six photographs of females and identified a woman whom he had seen with Davis and Bonner shortly after the robbery, although he did not know her name. After being informed by Agent Koletar that she was Trudy Regester, the sister of Edward Davis' wife, defendant, in the absence of counsel, signed a statement prepared by Agent Koletar identifying her as a woman who had conversed with two of the bank robbers, Bonner and Barry, in the Davis apartment during the

distribution of the money from the bank. In addition to his signature, the statement bore a sentence in his own handwriting acknowledging it to be "true and correct." He also placed his name and the date "3 May - 72" on the back of the photograph. Government's Exhs. 7 and 8.

Following the denial of a motion for acquittal based upon the asserted insufficiency of the government's evidence, defendant, who has no prior criminal record, testified in his own defense. He is a Sergeant E-5 in the United States Army, having enlisted at age 18 after completing high school some fourteen years ago. He has been decorated for extended combat service and wounds received in Vietnam and Cambodia. During service he completed two years of college level studies equivalent to an associate degree in liberal arts. He also acquired a drug habit in Vietnam in 1965 and was eventually returned to the United States. He is presently stationed at Fort Dix, New Jersey, pending the outcome of this criminal case.

Although he admitted signing his name, placing his initials and writing the statements that he had read the contents of Government's Exhs. 3, 4, 6 and 8, he flatly

denied any participation in the Kings Lafayette Bank robbery.

According to defendant's direct testimony, the two city detectives came to his apartment about 11:00 a.m. on April 24, 1972, when he was "shooting some heroin" with three other companions. He was told to get dressed, was not informed of any rights and did not meet Agent Koletar until taken downstairs to the automobile in which Koletar was seated with a drug informant whom defendant recognized.

At the 76th precinct, he testified, it was the officers who knew all the details about the bank robbery and did all the talking, merely asking him whether he knew this or that individual. Later, when Agent Koletar had completed writing, he was asked to sign certain papers, which he obediently did without reading them. Although he had asked to call his wife, who was at work, he was not permitted to do so until 5:25 p.m., when it was too late to get her at the office. He was then taken to F.B.I. headquarters, where he remained until he was finally brought to the Federal Detention Center at about 9:00 p.m. There he obtained a "tab" of methadone from a fellow inmate. He did

not receive methadone from the prison authorities until the next morning, just before he was brought over to the United States Magistrate's court.

At the Magistrate's proceedings, he testified a man came up and introduced himself as Mr. Winograd, saying he was there to represent him. Defendant had noticed this man previously speaking to Agent Koletar and the police officers. Winograd told defendant that he had been informed of his cooperation and said defendant should continue to cooperate with the officers and everything would be all right; that they would take care of getting him drug treatment. Defendant testified he told Winograd "You're really taking me for an idiot" and told him he didn't want Winograd to talk to him again.

However, on two subsequent occasions when defendant was shown photographs by the officers, he selected pictures of people he recognized and signed his name on the back. Government's Exhs. 5 and 7. He recalled also another occasion when Agent Koletar brought some federal narcotics agents to see him. They wanted him to work for them, "to go out into the street and secure information about who's

selling and trafficking in narcotics." He told them "they're out of their mind." Nevertheless, they gave him a card "should I change my mind."

On cross-examination, he enlarged upon his direct admissions to knowing Edward Davis — the apparent leader of the bank robbers — and having been asked by Davis in the middle of January 1972 whether he wanted to take part in the bank robbery. Defendant says he told Davis "he was crazy." Nevertheless, he was later approached again by Mervin Barry — one of the bank robbers — and went with Barry to Davis' apartment, which was just around the corner from where defendant lived. There were others present and more talk about the proposed robbery and the need to get guns, but defendant just "laughed" about it all.

He was also queried about his direct testimony concerning the interview with the federal drug agents he had mentioned, but denied he had acted as a drug runner for an individual named Richie Garbellotto or had told Agent Koletar that he had used his share of the proceeds of the bank robbery to pay off Garbellotto.

Agent Koletar was recalled as the government's

rebuttal witness. He testified that on May 26, 1972 — a month after defendant's arrest — he interviewed defendant concerning narcotics traffic information defendant told him he had. On the basis of that interview Koletar had prepared a detailed three-page memorandum dated May 30, 1972, addressed to the F.B.I.'s Special Agent in Charge for referral to the Bureau of Narcotics and Dangerous Drugs and to the Criminal Investigation Division of the United States Army.

According to Koletar, defendant identified Garbellotto as an acquaintance for whom defendant had acted as a courier in delivering narcotics. On one occasion, however, defendant got rid of a package of narcotics because he believed he was being set up. Garbellotto demanded payment or production of the package. Defendant told Koletar he had used part of the $12,000 proceeds from the Kings Lafayette Bank robbery to pay off Garbellotto.

The government marked the May 26, 1972 memorandum for identification (Government's Exh. 11) and turned it over to defense counsel for use in cross-examining Koletar on his rebuttal testimony. That cross-examination developed

that the memorandum was not prepared for use in the case but only for intelligence value and that Koletar was unfamiliar with the use made of it thereafter. Because of defense objections, the memorandum was subsequently marked Court Exh. 1 for consideration by the court in passing on those objections and ruling on the defendant's renewed motion for acquittal.

Defendant asks that "a judgment of not guilty be entered in the interests of justice", contending that the trial produced no evidence through eyewitnesses, photographs or any witnesses whatsoever that the defendant was at the Kings Lafayette Bank or participated in the robbery. Such evidence is wholly unnecessary, however, when, as here, it is shown by stipulated facts that a crime has been committed. No further corroboration of the defendant's confession is required. See Opper v. United States, 348 U.S. 84, 93 (1954); United States v. Braverman, 376 F.2d 249, 253 (2 Cir. 1967). Here, the court had already denied defendant's motion to suppress the written statement confessing to his involvement in the bank robbery (Government's Exh. 3), n. 2 supra. It was, of course, open to the defendant to renew at trial his

challenge to the voluntariness of the confession or its lack of factual veracity. Indeed, he had no other choice, for without contradicting evidence, the court would have been constrained in the circumstances to accept the confession as the best evidence of guilt beyond a reasonable doubt.

Defendant chose to challenge the credibility of his confession by substantially repeating testimony he had given at the prior suppression hearing concerning the circumstances of his arrest, the interview at the 76th precinct and subsequent contacts with Agent Koletar and the detectives, all designed to show that he had acted without understanding and under coercive influences. He thereby placed his own credibility in issue and exposed himself to the damaging revelation, noted above, made to Agent Koletar a month after his arrest and while he was purporting to cooperate in furnishing information about narcotics trafficking. Defendant opened the door to that testimony by his own statements on direct concerning his being interviewed by agents from the Bureau of Narcotics and his later denial on cross-examination that he had anything to do with Richie Garbellotto.

Recognizing the damaging effect of the government's

rebuttal evidence and its written embodiment (Court Exh.). defendant has made the exhibit the focal point of a four-pronged attack. He argues (1) that he did not open the door to the receipt of his later statement to Koletar as testified to on rebuttal; (2) that the government had withheld disclosure of this recorded statement of defendant despite a prior motion under Rule 16 which had requested all such statements in the possession of the government; (3) that Court Exh. 1 was a report by Agent Koletar which contained information about the case and should have been turned over as § 3500 material after Agent Koletar's direct examination had been completed; and (4) such evidence should in no event have been admitted because of the court's prior ruling suppressing all statements by defendant taken from him after May 3, 1972, and particularly a separate statement he signed dated May 26, 1972, relating to another group of photographs of suspected participants in the bank robbery.

As already indicated, contention (1) is without merit. His direct testimony concerning an interview with federal narcotics agents and Koletar concerning the information set forth in Court Exh. 1 clearly opened the door for

government counsel to ask him questions about his knowledge of Richie Carbellotto and drug dealings with him, as bearing upon the credibility of his denial of participation in the bank robbery to which he had confessed.

Defendant's contentions (2) and (3) above raise a more serious question with their suggestion that the government seriously breached its obligation to furnish defense counsel prior to trial with all statements made by defendant the government knew to exist. The government argues that Court Exh. 1 is merely an internal memorandum having no relation to this case; and further, that it had no intention of using such a memorandum at trial and therefore held nothing back it expected to use. Moreover, the government points out, defendant can hardly claim complete surprise since he testified at the suppression hearing and referred to Agent Koletar's taking notes as to his narcotics dealings.[4]

United States v. Padrone, 406 F.2d 560 (2 Cir. 1969), on which defendant mainly relies, held it was reversible error for the government not to furnish a copy of a statement made by defendant as required by a court order. Although the government's failure in that case was inadvertent, the court

regarded it as "so serious a detriment to the preparation for trial and the defense of serious criminal charges" as to warrant a new trial "where it is apparent . . . that . . . defense strategy may have been determined by the failure to comply. . . " Id. at 561.

Here the government cannot claim inadvertence. It made a deliberate decision to withhold Court Exh. 1, even though in the good faith belief that this was required by the court's earlier order suppressing any statements made after May 3, 1972. The difficulty with the government's contention is that an order prohibiting the government from using statements at a trial does not relieve the government of its obligation to make all statements of the defendant available to the defense prior to trial. As was recently pointed out in United States v. Percevault, 490 F.2d 126 (2 Cir. 1974), "[c]ommon sense and judicial experience teach that a defendant's prior statements in the possession of the government may be the single most crucial factor in the defendant's preparation for trial."

Defense counsel here asserts -- and the court has no reason to doubt him -- that the use of the statement in

Court Exh. 1 on rebuttal came as a complete surprise. He points out that he had no knowledge of it until government counsel turned it over for his use on the rebuttal cross-examination. Defense counsel understandably views the memorandum as "highly prejudicial" and states that it could well have affected defense strategy as to whether or not defendant should have taken the stand, or even if he did, whether narcotics should have been mentioned on the direct examination. It is essentially for these reasons that defendant urges the court to direct an acquittal "in the interests of justice."

The court in Padrone, supra, did not go that far; nor did it do so in United States v. Baum, 482 F.2d 1333 (2 Cir. 1973), where it severely criticized a government prosecutor for unjustifiably withholding disclosure of the identity of a prospective witness whose testimony was as equally crucial to the defense as it was to the government. In each case a new trial was directed because of the apparent prejudice to the defense.

Here, prejudice is claimed but not demonstrated. Must a new trial be granted simply because of the prosecutor's

error? United States v. Crisona, 416 F.2d 107 (2 Cir. 1969), would seem to support a negative response. There, although holding that a defendant's pre-arrest statements made on tapes were "statements" under Rule 16(a), F.R.Crim.P., that should have been disclosed to the defense, the court denied a new trial because the "failure to make them available was not in fact harmful." Id. at 115.

In this case, the defendant had no option not to testify. He was virtually compelled to take the stand to overcome the convincing force of a prior written statement, confessing his part in the robbery, the truth and correctness of which he had acknowledged in his own handwriting. Government's Exh. 3. He also admitted writing the "true and correct" statement and signing his name to the other statements and photographic exhibits in evidence. His attempt to dispel the force of these admissions by giving his version of the arrest and interviews added nothing to his prior testimony at the suppression hearing.

At the hearing and again at trial, the court found defendant to be an intelligent, shrewd, forceful and articulate man, whose lengthy Army career and combat service was wholly

inconsistent with his effort to portray himself as beclouded by narcotics and submissive to the overpowering influence of Agent Koletar and the two detectives. His own account of his observations and actions the next morning at the Magistrate's proceedings served only to complete the picture of a man completely in control of his faculties who fully understood what was going on.

However questionable the government's conduct in not disclosing Court Exh. 1 until rebuttal, testimony of defendant's oral statements to Agent Koletar a month after his arrest, which were consistent with his admission of guilt on the day of his arrest, is clearly admissible on the issue of credibility. Harris v. New York, 401 U.S. 222 (1971); United States v. Gaynor, 472 F.2d 899, (2 Cir. 1973).

For the foregoing reasons, the court is satisfied beyond a reasonable doubt that defendant's confession, Government's Exh. 3, was voluntarily made after he had been informed of his constitutional rights and that it truly reflects his guilt beyond a reasonable doubt of the charges set forth in Counts One and Two[5] of the indictment.

The defendant is found guilty on Count One and Count Two of the indictment. Count Three is dismissed.

Edward R. Neaher

U. S. D. J.

Dated: Brooklyn, New York
March 4, 1975

FOOTNOTES

1 A third count charged Johnson with conspiracy to rob the bank, 18 U.S.C. §371, but since the waiver of jury trial expressly extends only to the specified substantive counts, the conspiracy charge is deemed to have been abandoned by the government.

2 A pre-trial evidentiary hearing had been held on defendant's motion to suppress these documents and photographs. That motion was determined by a separate memorandum and order filed in the case on December 5, 1973. All documents and photographs herein referred to were held admissible at trial.

Contemporaneously, the court denied defendant's motion to dismiss the indictment for failure to afford him a speedy trial. See separate Memorandum and Order filed on November 23, 1973.

3 The accuracy of defendant's knowledge of the bank robbery in question within two months of its occurrence is confirmed by the subsequent pleas of guilty to separate indictments of each of the named participants except Davis. Davis, according to Agent Koletar, was arrested in California and gave a statement implicating himself in the crime but was never prosecuted because after psychiatric examination he was committed to the Matteawan State Hospital for the criminally insane while awaiting trial on a New York State homicide charge. The other participants are currently serving prison sentences imposed by this court. The defendant also subsequently identified the driver of the getaway car, one Samuel McDuffie, although the court suppressed the statement given by defendant as beyond the scope of his counsel's previous consent to contacts with the arresting officers without counsel being present.

3 (continued)
McDuffie pleaded not guilty to a separate indictment charging him with participation in the bank robbery, went to trial and was convicted by a jury on all counts. His conviction was affirmed by the Court of Appeals and he is presently serving the sentence imposed by this court.

4 See transcript of suppression hearing, May 10, 1973, p. 181.

5 Although defendant's confession shows that he was unarmed, his other statements make it clear that he knew others he identified as robbers were armed with handguns. Defendant is therefore guilty as a principal as charged in Count Two.

UNITED STATES GOVERNMENT

Memorandum

TO : SAC, NEW YORK

DATE: 5/30/72

FROM : SA JOSEPH W. KOLMAN, 221

SUBJECT: DISSEMINATION OF INFORMATION
(NARCOTICS MATTERS)

The following information was provided on 5/25/72 by WILLIAM [redacted] concerning incarcerated subject in NY file 91-11344, [redacted] "WILLIAM SAMUEL JOHNSON, M/ AL, Kings Lafayette Bank, 250 Fulton Street, Brooklyn, New York, 2/22/72; LA (000NY)". At this time JOHNSON is awaiting a plea date and subsequent sentencing.

It is recommended that information provided by JOHNSON be provided to Criminal Investigation Division, United States Army, Fort Riley, Kansas, as well as local and Federal agencies. JOHNSON stated on 5/25/72 that he would be willing to cooperate completely in this matter and will testify in any legal proceeding when required to do so.

JOHNSON advised as follows:

During July, 1971, he was assigned as a Sergeant (E-5) to "B" Company, 1st Battalion, 18th Infantry, Fort Riley, Kansas. His service number at that time was 100-32-2971. He became acquainted with a Negro male who was assigned as a Specialist 4th Class (E-4) to "A" Company, 1st Battalion, 18th Infantry. JOHNSON stated that he cannot remember this individual's name, but can ascertain in the near future. This man, he stated, was possibly assigned to the platoon of "A" Company. He stated that he is about 5'9", 160 pounds, medium build, and carries an operation scar which runs the full length of his left inside arm. This scar was the result of a jeep accident at Fort Riley.

JOHNSON stated that this individual was deeply involved in the sale of heroin at that time and that he saw him with substantial quantities of it. JOHNSON further stated that this individual was "controlled" by the Enlistment NCO (Non Commissioned Officer) for the battalion, a young white male, originally from Chicago, 6 feet, 185-200 pounds, with wavy blond hair, and driving a red Jaguar auto.

JOHNSON advised that the Negro male asked him if he was interested in becoming involved with the [redacted] JOHNSON advised that, inasmuch as he was [redacted] that he was not. The Negro male then [redacted] he had worked with in the NYC area. JOH[redacted]

[redacted]

(3)

a Negro male known to be involved in Brooklyn narcotics traffic by the nickname of "Butch Schultz", one [redacted], and one JACK LEE. JOHNSON stated that this individual advised that all these individuals were connected with the GALLO organized crime family of Brooklyn.

JOHNSON stated that he and the Negro male came to NYC in late August, 1971 or very early September, 1971. He stated that he was on leave with the intention of deserting, and that the Negro male was on thirty days leave prior to transfer to Viet Nam. JOHNSON stated that the Negro male, whose father owns a barber shop in Kenmore, New York, contacted him at his residence and instructed him to meet him at the Esquire Lounge, Atlantic Avenue and Kingston Avenue, Brooklyn, on September 2 or 3, 1971. JOHNSON stated that he did so and there met [redacted], JACK LEE and the Negro male. JOHNSON stated that he remembers the spelling of [redacted]'s name because he served in Europe with an individual of the same name and questioned him if it could have been a relative. JOHNSON stated that both white males were in a Cadillac Coupe de Ville, black in color, about 1970, with NY license plates which ended in # 371".

JOHNSON stated that [redacted] told him that he would be used only as a carrier of the drugs and that he would be dealing only with a kilo or more on each trip. JOHNSON stated that he was told by [redacted] that from each kilo, which because of street scarcity was selling for about $15,000 (pure), he would get about a "grand" for delivery services. "piece"

JOHNSON stated that he made a total of three runs for [redacted]. The first, on or about 9/9/71, was made when he met [redacted] and JACK LEE in the same car on a small, deadend street called Alice Court, off Atlantic Avenue, Brooklyn. There he got a kilo of heroin, wrapped in triple heavy plastic, double light plastic and imported in a brown paper bag. He stated that he delivered this to a TERRY LEE, a Negro male, 6', 165, light complexion, flashy dresser who favors wide hats, at the corner of Saratoga Avenue and Dicks Street, Brooklyn, NY, and received $16,000 in small, old bills from him in a shopping bag. This money, he stated, he delivered to [redacted].

Near the end of September, 1971, JOHNSON stated that he made another run for [redacted], this time receiving a kilo of heroin from he and JACK LEE in the same car at Rockaway Parkway, near Lincoln Terrace Park, Brooklyn. This package he delivered to a Negro male whose name he doesn't know, 5'7", 175, heavy build, dark complexion, flashy dresser, slow-witted, who works for TERRY LEE. JOHNSON stated that he again received $16,000 from this individual, which he again turned over to [redacted]. JOHNSON stated that he met this Negro male at the corner of Hopkinson and Sutter Streets, Brooklyn. JOHNSON stated that a Negro male who drove a red Plymouth Roadrunner souped-up, collected the money from him for [redacted] near a news stand at the corner of Church Avenue and Eastern Avenue, Brooklyn.

JOHNSON stated that during the early part of October, 1971, he met with CARRILLO at [redacted] in the same car on Rockaway Parkway, near Sutter Avenue, Brooklyn. He stated that he drove a short way in the car with them and then got out with a kilo of heroin. He stated that he was proceeding on Atlantic Avenue toward Alabama Street, Brooklyn, when he noticed that he was being tailed by three Negro males. JOHNSON stated that he realized that he was about to be robbed of the shipment. He stated that at that time saw a NYCPD patrol car sitting near the intersection. He stated that to avoid being robbed he threw the package over a fence into a vacant lot and walked toward the police car. He stated that he then went a short distance away and observed the package. He stated that the three Negro males sent the young Negro boy, about ten years old, to get the package and bring it to them. JOHNSON stated that he watched the three men make off with the package and noted them on an adjacent corner at the Cadillac used by CARRILLO. He stated that in the race discussion the three Negro males were. Then, JOHNSON stated, he concluded that he had been "beat up" by CARRILLO.

Shortly after Christmas, 1971, JOHNSON stated, he was telephonically contacted by CARRILLO, who demanded to know where the money from the shipment was. JOHNSON stated that he replied that he owed CARRILLO. He stated that he did not believe it and physically threatened JOHNSON if he did pay. JOHNSON stated that he refused. JOHNSON advised that from that point until early March, 1972, he and his wife were frequently threatened at their home and that on several occasions several Negro males would park in front of his house late at night and shout his name from a car until he came to the window. At that point, he stated, they would fire pistol shots into the air.

JOHNSON stated that he decided to pay the money and, on one day in the early part of March, 1972, paid CARRILLO the money he owed him. He stated that he used a large part of his $12,000 share from the bank robbery he helped commit in the payment, but that CARRILLO did not know that the money had come from a robbery. JOHNSON stated that he paid CARRILLO in the presence of JANE LNU and a old white male in the same Cadillac near Rockaway Parkway and Kings Highway, Brooklyn.

JOHNSON described CARRILLO and JANE LNU as follows:

CARRILLO - 5'8-10", 150 pounds, round shoulders, thin narrow face with a pale, dull complexion, pencil mustache, beady eyes, 25-30 years old, Italian extraction, normally wearing sports jackets and slacks, wears a blue college type ring on his left ring finger.

JANE LNU - 30-35, 170-180 pounds, 6' +, square shoulders, short neck, slender but solid build, normally wore a 3/4 length windbreaker without a zipper, patch pockets, probably of Irish extraction, smokes thin cigars with a plastic tip.

THE COURT: All right, call the other one now.

THE CLERK: For waiver of indictment, United States of America versus William C. Johnson.

Will you bring Mr. Johnson up please.

MR. WINOGRAD: Your Honor ---

THE CLERK: Will you wait just a moment.

MR. WINOGRAD: All right.

THE COURT: All right, we have Mr. Pattison appearing for the Government.

You are William C. Johnson?

DEFENDANT JOHNSON: I am, your Honor.

THE COURT: You have a lawyer, the lawyer who stands beside you, is that correct?

DEFENDANT JOHNSON: That is correct.

THE COURT: What is your name, sir.

MR. WINOGRAD: Joel Winograd, W-i-n-o-g-r-a-d.

THE COURT: All right, what is this all about.

MR. PATTISON: Your Honor, as of now we would ask that this item be marked off as of now. There will not be any waiver.

THE COURT: Well, I will mark it off.

MR. PATTISON: And we'd be allowed to proceed

to the Grand Jury promptly.

THE COURT: I see. What matter is this?

MR. PATTISON: This is part of the Kings County Lafayette robbery.

THE COURT: There must have been a whole army.

MR. PATTISON: I think there were nine defendants originally.

THE COURT: But from the way they keep coming up and back it is like, you know, at the opera where they have got about twelve fellows dressed in the uniform of roman soldiers with spears, and they keep marching up and back and up and back, and after awhile you get the impression that is an army.

MR. PATTISON: I believe there were a total of approximately nine.

THE COURT: Okay. You still have recovered only $800 of the $89,000.

MR. PATTISON: That is approximately right.

THE COURT: It is a distressing circumstance.

MR. PATTISON: Your Honor, now with regard to the other matter which we had on earlier ---

THE COURT: How many have pleaded so far?

I went before Judge Catoggio and he told me to return on May 9 for bail reduction.

THECOURT: What is your bail?

THE DEFENDANT: $25,000. What happened is Judge Catoggio -- I am in the military now. I have been in for twelve and a half years. Just before I left Vietnam --

THE COURT: All I can do is mark this off. It is for waiver of indictment. Has an indictment been found against this defendant?

MR. SCHLAM: I dont believe so.

THE COURT: My clerk tells me we have no papers on this case, no indictment found. Well, it is off. The lawyer would know what to do. You are in custody. No indictment has been found, so no waiver of indictment can be obtained from you without a full explanation of your rights and without your representation by an attorney to advise you, to protect your interest.

Under the circumstances, I have no choice but to mark this off. What is the bail?

MR. SCHLAM: $25,000.

THE COURT: All right. Bail continued. The defendant is remanded.

You better tell Mr. Pattison to get the indictment down.

MR. SCHLAM: When the defendant mentioned about his Vietnam service, Mr. Pattison mentioned to me yesterday, there had been conversations, I believe, between Mr. Pattison and this defendant --

THE DEFENDANT: None whatsoever. I saw him once. Thefirst time I was in Court, and I did not speak to him and that was the last time I saw him.

THE COURT: Well, tell Mr. Pattison to get busy with what he is doing and not to imagine things. Let him get the indictment and he will have to plead with or without an attorney as the circumstances dictate and he will be tried. The defendant is entitled to that but in the meantime, as to the waiver of indictment, there is no indictment here and the Government cannot Constitutionally proceed against the defendant by information --

MR. SCHLAM: Yes, your Honor --

THE COURT: Without the defendant's consent.

All right. It is marked off. The defendant is remanded.

. . . . . .

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- :

72 CR 921

WILLIAM JOHNSON, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

December 11, 1972
2:00 p.m.

HONORABLE EDWARD R. NEAHER, U.S.D.J.

HENRY R. SHAPIRO
OFFICIAL COURT REPORTER

Appearances:

ROBERT A. MORSE, ESQ.
United States Attorney
For the Eastern District of New York

BY: THOMAS PATTISON, ESQ.
Assistant United States Attorney

- - -

THE CLERK: Criminal cause for trial, United States of America versus William Johnson.

MR. PATTISON: Good afternoon.

THE COURT: This is a custody case?

MR. PATTISON: I believe so. I do not know if he is up yet.

THE COURT: Who is representing him?

MR. PATTISON: Mr. Winograd. I called his office Friday and I was told by his office that he was presently on trial in the Southern District, I think. I do not know whether he received any notification or what, but I assume he did.

As I say, I was told Friday that he was presently engaged.

THE COURT: No idea as to how long that trial will last?

MR. PATTISON: The girl did not know.

THE COURT: He has been in for quite some time.

MR. PATTISON: Yes, your Honor. This was a case in which we came up before the Court sometime ago in which there was quite a lengthy meeting in which we talked about the facts of the case and the fact that he was to have been

a witness for us and was to have pled guilty. This was worked out with his lawyer and after approximately two months of this, on the day that the plea was to have been entered, he changed his mind.

I think we all agreed at that time, prior to which he changed his mind, it was the result of his own wishes and that for whatever purpose -- whenever the record is reviewed and if it is -- I think we can safely satisfy everyone on that point.

THE COURT: Mr. Winograd is a court-appointed counsel for him?

MR. PATTISON: Yes, I understand that he is.

THE COURT: He was the attorney with whom these --

MR. PATTISON: Yes, he has been representing him the entire time and, I believe, he agreed with me on the record last time when we appeared, that he had planned to enter a plea for his client. He had talked with his client, he had talked with his client's relatives and we had discussed Nara treatment, et cetera.

As I say, he has been representing him ever since the first arrest.

THE COURT: Is this comparable to the McDuffy case?

MR. PATTISON: Yes.

THE COURT: How long did we take with that?

MR. PATTISON: Three days.

THE COURT: Is there going to be a suppression hearing, do you know?

MR. PATTISON: There has not been any motions filed. As a matter of fact, in this case, the day that he was charged with the crime, arraigned, and his lawyer was assigned, we had a lengthy meeting wherein which we told him that statements were made. He agreed to have his client re-interviewed and brought over from West Street by the agents. There has been knowledge that written statements were made for quite some time. It is not a surprise. There hasn't been any motions made.

THE COURT: Are you in a position to start Monday?

MR. PATTISON: I have one other trial set for the 18th. That case will be short, about two

days or so. It is a Jewish Defense League case, a bombing, which I have before Judge Mishler starting Monday the 18th. That date has been firm for about three months. It is a non-jury trial.

THE COURT: The only other date would be the 8th of January.

What about this other lawyer, Mr. Winograd?

MR. PATTISON: May I call him and inform him of this fact? I think there is a good chance of a plea in this case.

THE COURT: Why don't we try that then.

MR. PATTISON: Yes, sir. I will inform him of that fact.

THE COURT: Why don't we make it at 11 o'clock?

MR. PATTISON: I am informed, possibly from my prior meetings with him, may I ask that the Clerk also send a letter to him. I think it would be a little more effective than my phone calls.

THE COURT: If he agrees with you, let me know that. There is no use sending him a letter for January 8th if --

MR. PATTISON: Yes, but at least a letter from the Court would get the ball rolling in a sense. I know that he will answer. I have called him four or five times and left my name and number and messages do not get answered.

THE COURT: The only thing I was going to say is any problem here with his representation?

MR. PATTISON: I thought that there might be and it was raised the last time that we met. He talked with his client for a while and then both put on the record that the client was satisfied with him. I think we went through it once before and it was settled.

THE COURT: All right, if there is any problem with that date, then we will have to move it forward.

MR. PATTISON: Yes.

May only problem -- the only day in which I would not be ready would be next week, the 18th. There are two other lawyers involved there and they are ready. I am sure of that.

THE COURT: Very well.

(Whereupon the hearing was concluded.)

****

that I had seen Edward Davis's wife once, and I was told to pick the woman who resembled her most.

Q But again, when you signed it you did not mean by signing it to imply that she had anything to do with the actual robbery?

A No.

Q And the agents didn't ask you waoub that? Just whether -- to pick a woman who looked like Eddie Davis's wife most?

A That's correct.

Q You also said, after being asked about it by Mr. Lashley, that you were interviewed by agents of the BNDD?

A Yes.

Q Do you recollect that?

A That's right.

Q Prior to that interview, had you told Agent Koletar anything concerning your involvement in drugs -- narcotics?

A I had.

Q And had you told him about any alleged organized crime figures that were involved with you?

MR. LASHLEY: Objection, your Honor.

Q With drugs?

THE COURT: I will overrule the objection.

A I spoke to Mr. Koletar. Mr. Koletar asked me

did I know anything about an individual -- first he spoke about my using narcotics. And the people who I bought narcotics from. And I explained to him that through an individual who was once in the Army with me, whose father offered me a job in a foundry on Bond Street and Union, and the individual lived at 35 Bond Street, whose name was Richard Garbelotto and because of the association with this individual I had in the Army, and we became very close, his father wanted to have me work with his son and it was in organized crime, and I could get drugs and whatever else I needed, if I wanted it.

Then I was -- began to ask about prices of drugs and what-not. This is what Agent Koletar asked me, about prices of drugs and how I could get them and individuals, and I identified some individuals to him who had propositioned me at one time or another.

Agent Koletar took all of this down and the next time is when he brought the Bureau of Narcotics & Dangerous Drugs there to proposition me and tell me they could get me in the street and all the things they could do for me.

Q Did you tell Agent Koletar that you had paid Richie Garbelotto the $12,000 that you got as part of the loot from the crime involved here, bank robbery?

A No, I did not. I haven't seen Richie Garbelotto since, I'd say, at least since 1963.

Q Did you tell him that shortly after Christmas, 1971, you met Richie Garbelotto?

A No. That was impossible to tell him this because shortly after Christmas, 1971, is exactly or close to nine or 10 years from the last time I had seen Richie Garbelotto, nine or ten years, and I doubt --

Q Because of that it was impossible for you to have told Agent Koletar?

A That's correct. That's correct.

Q Did you tell Agent Koletar that you had made approximately three trips as a courier of drugs for Richie Garbelotto and Jake Schultz -- or pardon me -- Dutch Schultz and a man named Jake, during 1971?

A That's ridiculous. Never. Did I --

MR. PATTISON: May I ask that the question be read back? May I ask for a yes or no answer, please?

THE WITNESS: The answer is no. I heard the question.

Q You did not tell Agent Koletar?

A No, I did not.

Q There isn't any doubt in your mind?

A None whatsoever.

Q Did you tell Agent Koletar that Richie Garbelotto caused you to be threatened during March of 1972 because you allegedly owed him some money from a drug deal?

A No, I did not.

Q And that that was why you paid him $12,000 from you share in the loot?

A No, I did not.

Q Sir, where were you on February 29, 1972, during the early morning hours?

A At home.

Q Approximately 8:00 a.m. to 9:00 a.m.?

A At home, as I am every day.

Q Were you at work?

A I beg your pardon.

Q Were you at work? Didyou have a job during this time at or about this time?

A I worked, yes, I might have been at work. I worked with my brother-in-law who is an electrician. Right now he works at Fort Hamilton. He's a assistant director there for their facilities.

Q Does he keep a record of the days that you work and the days that you don't?

A No, he doesn't. This is family. He has a

JOSEPH W. KOLETAR, called as a witness herein, having been previously duly sworn by the Clerk of the Court, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. PATTISON:

THE CLERK: You are still under oath, sir. You have been sworn.

Q Agent Koletar, did you interview Mr. Johnson on May 26, 1972?

A Yes, sir, I did.

Q In the course of that interview, did you question him as to what, if anything, he did with the $21,000 proceeds?

MR. LASHLEY: Your Honor, I'm objecting to any interview on May 26, 1972, based on rebuttal, because your Honor has ruled that any interviews of -- past May 3, 1972 are to be surpressed.

MR. PATTISON: Your Honor, the defendant Johnson testified about his interview with the agents concerning narcotics and the whereabouts or his use of his -- his use of the loot.

I think that under Harris v. New York, which I believe I misstated earlier, I believe that this is

perfectly relevant. It goes to his credibility only. I thinkthat the door is in fact opened.

THE COURT: I will overrule your objection on that ground, that the rebuttal examination is limited to statements made by Mr. Johnson on cross-examination, which related to this relationship between this --himself and this man Garbelotto.

MR. LASHLEY: Judge, I had objected to anything that occurred on that date and I was overruled as to any conversations or questioning by Agent Koletar with the defendant.

I made an objection prior.

MR. PATTISON: Direct examination is -- it was brought out, your Honor.

MR. LASHLEY: No, I didn't. I didn't mention May 26 on direct examination.

MR. PATTISON: Narcotics transactions you did, BND interview, you did.

MR. LASHLEY: I just asked him whether --

MR. PATTISON: Which was May 26.

MR. LASHLEY: Your Honor, direct examination I just asked the defendant whether he used narcotics and I never brought out anything about transactions in narcotics or trafficking in narcotics.

MR. PATTISON: The defendant on direct examination mentioned the interviews with the BND agents.

MR. LASHLEY: But --

MR. PATTISON: Am I correct?

MR.LASHLEY: That was on May 1st and May 3rd.

MR. PATTISON: No, it was not. It was on May 26.

MR. LASHLEY: He just--

MR. PATTISON: I have the proof here.

MR. LASHLEY: But he didn't go into the conversations. He just said men came to see him.

MR. PATTISON: I believe that he did go into them in the sense of at least saying what they were about, characterizing them as being totally fruitless, etc..

THE COURT: There is a reference to his talking to BND men, that I do have to say my notes indicate the questioning was regarding May 3rd.

However, --

MR. PATTISON: Your Honor, may --

THE COURT: He then later says he was taken up to Mr. Pattison's office, where he met his wife. This is on his direct examination, isn't it?

MR. PATTISON: Your Honor, may I just say that

I think we can show that his date is wrong, that it in fact was much later than that, before he was ever interviewed by BND agents and I can show -- and I will show with this witness exactly when and how that interview did occur.

In other words, your Honor, the mere fact that the witness ascribes a May 3rd date to a topic which he talks about shouldn't preclude our offering evidence about it now on the grounds that it was -- that the witness didn't say that it was May 26.

MR. LASHLEY: Judge, I was never furnished copies of any of these alleged statements, which Mr. Pattison is now going into.

THE COURT: Which had been surpressed.

MR. PATTISON: Not a statement, your Honor.

MR. LASHLEY: It's an interview with the defendan

MR. PATTISON: This is Agent Koletar's private memo concerning this, which he sent to the agent in charge of his office. It is not a statement per se.

MR. LASHLEY: I never received it.

MR. PATTISON: It is not a written statement of anything.

MR. LASHLEY: I've never received it even under 3500 material.

MR. PATTISON: His direct examination didn't go into this. As a matter of fact, it was limited up to the 3rd of May.

MR. LASHLEY: If it's an interview with the defendant where certain questions were asked of this defendant and answers given, then I submit, your Honor, it's part of a statement that should have been furnished to me prior to the trial along with the other statements that I received.

THE COURT: Well, as I understand it, though, what Mr. Pattison is referring to is questioning by you concerning his interviews with men from the BNDD.

MR. LASHLEY: I did not ask that question on direct.

MR. PATTISON: Your Honor, the witness --

MR. LASHLEY: The witness mentioned during an interview that agents came down to see him with Agent Koletar from the --

THE COURT: It was his answer.

MR. PATTISON: Yes.

MR. LASHLEY: Just that they came down to see him but I didn't go into specifics along that line. I didn't open the door. By his answer he didn't open the door, saying they came down to see him.

MR. PATTISON: I think he said a little more than that, that they propositioned him.

THE COURT: That is right.

He was told to sit down and listen to the men from the BNDD. TAken to a room where Koletar and other BNDD agents were present. He was questioned regarding working with them to catch drug dealers. That may not have been his words but that was the substance I was putting down.

He gave an answer to the effect that you must be out of your mind, or something to that effect. Then he was given a card by someone, one of them, I take it, and -- to get in touch with someone, presumably -- I didn't put that down but my recollectio was someone gave him a card to get in touch with somebody if he changed his mind or -- then he was taken up to see his wife.

However, he did on cross-examination go -- he was cross-examined about relationships and dealings with this Richey Garbelotto, as I understand it.

MR. PATTISON: Yes.

THE COURT: I take it, this is directed to that.

MR. PATTISON: Yes, it is, your Honor.

THE COURT: So --

MR. PATTISON: Your Honor --

THE COURT: Your objection is noted to the fact that you were not aware of this other report, but --

MR. PATTISON: I'll show it to Mr. Lashley now.

THE COURT: Since this came up on [illegible] examination, obviously you will be given an opportunity to review that report before you cross-examine Mr. Koletar on this topic or these topics.

That would certainly be your 3500 right, at the very least, whether you had a broader right than that I can't say at this time.

It does seem to me that under the Harris case and the Gaynor case in this Circuit, it is legitimate where a defendant has taken the stand and has made statements, to -- for the Government to counter that testimony by anything which might tend to show it was not worthy of belief.

We do have very sharp issues of credibility in this case.

MR. LASHLEY: I understand, but this is an interview of May 26 which I objected to because your Honor suppressed any interviews of that date.

THE COURT: I understand that but all I am

saying is: On your direct, for whatever reason, -- and I can't say it came about as questions that you put to him, but in one of his answers he talked about his being interviewed by the Drug agents and so forth.

And on cross-examination, then Mr.Pattison went into that subject of drugs with him and into this question of Garbelotto, who Garbelotto was and so forth.

MR. LASHLEY: Which I objected to prior to his asking this entire line of questioning because it was something that was suppressed at a hearing and here --

(continued next page.)

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THE COURT: Wait a minute. Regarding the BND -- he was asked regarding the BNDD agents interview, and he -- just summarizing and I -- this is by no means anything more than my sketchy notes. I understand he said he had previously told this agen of his involvement with drugs. And there was referen to a Richard Garbelotto and that person's involvement in drugs.

He made certain denials when he was asked whether he had ever paid Garbelotto the $12,000, saying he hadn't seen him and so forth. Also denied telling this agent that he had made three trips as a courier for Garbelotto, Dutch Schultz and some thir man whose name I didn't get.

MR. PATTISON: Jake, your Honor.

THE COURT: Jake. And denies telling Koletar that Garbelotto threatened him because he owed Garbelltto money and that was why he paid the $12,000

As I say, all this is only on the question of credibility, if there is -- if there is something which contradicts this story. Then it seems to me, I -- it is admissible on the issue of defendant's credibility, which is very much in issue in this case

Can't help that. That is what the problem

always is, and particularly here where I've got to try to make up my mink as to whether you r client is telling the truth. It's important to him as well.

I'm not saying -- I don't know what this is, what we're going -- what I'm going to hear.

MR. LASHLEY: No.

THE COURT: It may fall flat as a lead balloon for all I know. I just don't know.

MR. LASHLEY: No. My point is, your Honor, that this ia a May 26th conversation with the defendant which was expressed at a prior hearing. Now, I objected to Mr. Pattison bringing up any conversations that occurred on that date, on May 26th, during his cross-examination.

MR. PATTISON: That objection was overruled.

MR. LASHLEY: Now on rebuttal he's seeking again to bring Agent Koletar in to testify as to what was said.

THE COURT: The only reason you were overruled on the cross-examination was that this area of discussion had come out almost voluntarily by this witness, apparently. Not in response to questions -- it may have been triggered by some question that related to something about drugs. I don't know what

brought it out but it did come out.

MR. LASHLEY: All he said was, "I had a conversation with the drug agents."

THE COURT: He was asked to cooperate with them.

MR. LASHLEY: That's right.

THE COURT: And so forth and he -- and his answer was, "You must be out of your mind." What does that mean? That there was nothing to it? Or that no man in his right mind would get himself involved with people that were involved in it. And now -- then he's asked on cross-examination, well, didn't Richard Garbelotto threaten him, threaten his life. And isn't that why you paid him the money.

Now, I don't know what is -- what this is for. All I can say is, it seems to me it has a bearing on the very critical issue of credibility here, which unfortunately I must resolve.

MR. PATTISON: Your Honor, may I also say that the other purpose which I think actually shows his attitude, whether it was cooperative or not. On May 26th. I think it is distinctly relevant.

THE COURT: Well, at any rate, you have an exception, Mr. Lashley, and as I say, I haven't even

heard this evidence yet but at least in the light of what I know did take place on cross-examination and statements made by Mr. Johnson on cross-examination, I will have to hear just whether or not this really impairs his credibility.

MR. PATTISON: Your Honor, may I just say that I will be very short at this time. Possibly cross-examination could be held after lunch.

THE COURT: Yes.

MR. PATTISON: During which time you can read this.

THE COURT: I'll certainly give Mr. Lashley every opportunity here to cross examine this agent.

BY MR. LASHLEY:

Q Agent Koletar, did you interview Mr. Johnson on May 26, 1972?

A Yes, sir, I did.

Q And did you interview him concerning his use of the proceeds of the bank robbery?

A Yes, sir. That came up. I was primarily interviewing him with regard to his knowledge of narcotic traffic.

Q What if anything did he say concerning his use of the $12,000 which he said was his share of the loot?

A He stated that he had gotten involved in the narcotics traffic in the New York City area and that he had been a courier of sorts. On one of his courier runs, I believe it was the third one, some sort of problem came up where he had to dispose of the narcotics he was carrying. When he went back to get them, they were gone.

He then suspected that he had been set up in that he had been tricked into disposing of them by someone who then stole what he had disposed of and that he was pressured by an individual by the name of Garbelotto to either produce the narcotics or to make good the debt he owed Garbelotto. He stated that he used money from the robbery in question to satisfy this debt.

Q And --

MR. PATTISON: I ask that this be marked, please. For identification, please.

THE CLERK: A three page document marked for identification as Government's Exhibit No. 11 in this trial.

(So marked)

BY MR. LASHLEY:

Q Sir, after this interview which you have just talked about, summarized, did there come a time when you wrote a memo concerning it?

A Yes, sir, there did. on May 30th of 1972.

Q To whom did you write the memo?

A It is directed to SAC New York City.

Q What does that mean?

A Stands for Special Agent in charge of the New York City Office of the FBI?

Q Now, did you question Johnson as to whether or not he would be willing to cooperate further with other agents, BND agents, and also possibly be a witness concerning theses matters?

A Yes, sir. On the 26th, following our discussion, and my taking of notes regarding what he had said, I asked him if he would be willing to talk to other law enforcement officials about this. He said he would. I asked him if it became necessary, if he would be willing to testify in legal proceedings regarding what he had told me. He said that he would.

Q And didn't you put that into that memo, sir? Copy of which is Government's Exhibit 11, is it not, sir?

A Yes, sir. It is Government's Exhibit 11 and it is in that memo.

Q And did you or did you not, sir, recommend that other federal agents involved, BND, be informed of these facts?

A Yes, sir, inasmuch as in this conversation with me, Mr. Johnson mentioned narcotics activity in the U.S. Army, I recommended that this information be provided to the U.S. Army, also to local and federal agencies that had interest.

Q Sir, if, when you questioned Johnson concerning narcotics activities and/or the -- his use of the proceeds of the robbery, if he had told you that you were out of your mind, would you have recommended -- would you have written that memo and asked that it be sent to other agencies?

A No, sir.

Q U.S. Army? BND et cetera?

A No, sir. There would have been no point to it.

MR. PATTISON: Thank you very much. I don't have any other questions.

THE COURT: All right. We will take a recess until 2:00 o'clock.

MR. LASHLEY: Judge, I don't think I need a recess. And I have that other matter on this afternoon.

THE COURT: What time? Wasn't it three?

MR. LASHLEY: I have to be there by three.

THE COURT: Where is it?

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1 AFTERNOON SESSION

THE COURT: Good afternoon, gentlemen.

You may proceed.

MR. LASHLEY: Thank you.

JOSEPH W. KOLETAR, called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. LASHLEY (Cont'd):

Q Agent Koletar, on May 26, 1972, where did you interview Mr. Johnson?

A In the Marshal's office in the basement of this building.

Q And who else was present?

A I believe at that time I was by myself.

Q And how did you arrange to have him interviewed? How did you know Mr. Johnson would be in the building?

A I don't recall. Very likely it was one of two circumstances. He was over for some other matter or I asked Mr. Pattison if he could arrange through the Marshals to have him brought over in the van.

Q What was the purpose of your meeting him?

A Basically that in -- in prior conversations,

he had come out with some details, some narrative concerning this narcotics aspect of his activities, but I'd never had a chance to really sit down with him and go through it in one sitting. That's what I wanted to do.

He had indicated previously he wouldn't object to talking about it in more detail. So I just wanted to sit down at one time and get it straight in my mind.

Q Did you also show him photographs at that meeting?

A At the meeting on the 26th?

Q Yes.

A Yes, I believe I did.

Q Now, I show you Government's Exhibit No. 12 -- I'm sorry. It's -- do you know what number it is? I can't read it.

THE CLERK: That's the ninth. One-page document. This was the ninth, the one-page document. That's the one-page document.

MR. LASHLEY: Number 9?

THE CLERK: Number 9.

BY MR. LASHLEY:

Q Agent Koletar, I show you Government's Exhibit No. 9 for Identification and ask you if that is the statement that you had Mr. Johnson sign on May 26, 1971? '72,

I'm sorry.

A Yes, sir. Mr. Johnson signed this relative to his choice of a photograph.

Q I show you now Government's Exhibit No. 11 for Identification. Is that your report relative to your conversation with Mr. Johnson concerning marcotics?

A Yes, sir. It's not technically a report but it's a summation of what we discussed.

Q Did you ever reduce that into a statement form?

A A signed statement?

Q Yes, for Mr. Johnson to sign?

A No, sir.

Q Yet on the same day you made him sign this statement which is Government's Exhibit No. 9 for Identification; is that correct?

A I didn't make him sign it. He signed it, yes, sir.

Q You asked him to sign it?

A Yes, sir.

Q But you never asked him to sign anything in connection with your conversation with him concerning narcotices; is that correct?

A That's correct.

Q And these -- both of these conversations took place on thesame day; is that correct?

A Yes.

Q At the same time? During the same interview?

A Yes.

Q Did you feel that the information you received concerning narcotics was important to you and to the Government?

A I believedit was important, yes.

Q Did you feel it was important enough for Mr. Johnson to sign a statement concerning his narcotics activities?

A Inasmuch as it was primarily of an intelligence value and it was in the jurisdiction other than that of the FBI, I didn'ttake a signed statement regarding it.

Q Did you personally check out any of the information contained in that statement concerning narcotics as far as other individuals are concerned?

A I'm sorry. I don't understand your question.

Q Did you ever interview any individualswho are named in this report of yours?

A I attempted through our records to identify Garbelotto. I was unable to do so.

Q Is there any such person named Garbelotto?

A I don't know.

Q But you are -- the Government cannot identify such a person; is that correct?

A I don't know, sir. I attempted through our indices in the New York office to locate that name and I couldn't do so. Whether another Federal agency did, I don't know.

Q What about the other people who are mentioned in this report, were you able to locate or identify any of the other people?

A I wasn't, no, sir.

Q Do you know if anybody for the Government was?

A I don't know, sir.

Q After this interview, did you take notes of this narcotics conversation, alleged narcotics conversation you had with Mr. Johnson?

A During the course of the interview, I took notes, yes, sir.

Q What did you do with those notes?

A Once I summarized them in that document you have, I destroyed them.

Q Is this the only document concerning that conversation, the one I showed you as Government's Exhibit No. 11 for Identification?

A The original and other copies of it, yes, sir.

MR. LASHLEY: No further questions.

MR. PATTISON: I don't have anything else, your Honor.

THE COURT: All right. You may step down, Mr, Koletar.

(Witness excused.)

MR. PATTISON: Your Honor, the Government rests rebuttal case.

THE COURT: All right, Mr. Lashley.

MR. LASHLEY: Your Honor, before I make my formal motion for a judgment of acquittal, I again renew my motion to strike any testimony of Agent Koletar that has been elicited on rebuttal here today on three grounds.

Number one, I'd ask your Honor to review the record and to determine whether the defendant Johnson, himself, opened the door to any type of testimony concerning the May 26th conversation with Agent Koletar involving narcotics.

And, secondly, on the ground that the Government failed to turn over to the defendant this statement which is Government's Exhibit 11 for Identification

even though a formal motion was made by the defendant, which was argued before your Honor on April 13, 1973, in which pursuant to Rule 16 the defendant moved for all reports, memoranda, or other internal Government documents made by Government agents concerning statements and admissions made by the defendant.

Now, that is 1 (c) of the notice of motion which was argued before your Honor, which Mr. Pattison at that time consented to turn over to the defendant. I had not, until it was produced shortly before the lunch recess, had any knowledge of that statement, which Agent Koletar reduced to writing. Total surprise to me and if I had been apprised of that, perhaps the -- any mention of narcotics would not have been elicited on the direct case as far as the defendant is concerned.

I am not admitting it was but I don't think the defendant wouldhave testified at all concerning narcotics, because it was not an essential part of the issues of this case.

And, thirdly, I ask that the testimony be striken on the grounds that it again pertained to a conversation that occurred on May 26th, in which after a Miranda hearing, your Honor ruled in favor

of the defendant not to admit any testimony concerning the May 26th interview, and I had objected when Mr. Pattison started inquiring along those lines on May 26th, and I renewed my objection when Agent Koletar took the stand concerning conversations, whether they had to do with narcotics or the bank robbery, I objected on both grounds.

On those three points, your Honor, I renew the motion to strike Agent Koletar's rebuttal testimony.

THE COURT: All right.

Now, the Government have anything it wishes to say in response to that?

MR. PATTISON: Yes, your Honor.

Just let me say this, that first of all, the reason that this was gone into has been made clear.

The Court has in fact ruled upon it. Based upon, and just in short, I believe that it was because of the defendant's characterization of the meetings concerning narcotics, which he himself opened the door to, on his own case, before cross-examination -- before cross-examination, direct examination, which made the questions on cross-examination, particularly relevant, probative, and which, in light of the defendant's answers to those questions on

9 cross-examination made the rebuttal case proper, relevant.

I think that the Court's prior ruling concerning the -- the May 26th interview was adhered to throughout the Government's case, and that it was only as a result of the defendant's testimony concerning all of his meetings with the agents that the May 26th meeting became relevant and was opened up in light of the Harris case and the Second Circuit case, Gaynor.

We had information and we had evidence which tended to impeach the witness, the credibility of that witness, and althought we were precluded from using it on our own case, it is proper cross-examination.

I believe tht that is what Harris stands for and if ever it was application, it was applicable here. I think that with regard to our turning over the statement to Mr. Lashley, may I say two thi

Number one, this statement was not used durin our own case. It is not relevant to the bank robbery charges, except in a very perifpheral way, in which he says that the $12,000 loot was used to pay off this man involved in the drug sales. It was not offered by us on our case.

10 I believe that 16, the rule, pertains to statements which are the subject matter of the case. I think that this can be characterized as not even any such thing, a statement first of all.

I think that it is the agent's internal memorandum sent to his own office. It is part of his file. It is not a word-by-word statement, as are the other May -- well, as are the April 24th, May 1st, May 3rd and May 26th statements, all of which were turned over and all of which deal with the instant charge, bank robbery. This does not. It is a -- it is in fact, as the Court may look at, although it has not been offered into evidence, it is an internal memorandum concerning a recommendation that the FBI office contact other Federal and local offices. That is all it is.

It was turned over as part of the agent's 3500 material once he took the actual witness stand on that point. But to say that it should have been turned over prior to trial, I think there is no authority for that. And it would not have been used, had it not been for Mr. Johnson's testimony.

I think that that answers Mr. Lashley's points.

THE COURT: Well, let me ask you this, though.

As I -- I have not seen the memorandum in

11 question, but I do believe that any reported of the statement of a defendant comes within the turn-over rule, for the simple reason that I recall even where an assistant U. S. attorney makes notes of an interview with a defendant, those are producible as -- if they purport to record even in the U. S. -- assistant's own words that -- at least that is my understanding of the rule.

MR. PATTISON: Well, your Honor, I think that it is, number one, it depends on the topic.

THE COURT: Well --

MR. PATTISON: Subject matter. If it's -- foreign to the --

THE COURT: I don't know whether that can be sustained because certainly statements were made here that were pertinent or at least considered pertinent, since the memorandum formed the basis for questioning of the defendant in the case, and now on the basis of his testimony, it would appear that the information was recorded as a result of the same interview which produced another statement that had not been admitted into evidence becuase of the failure to --

MR. PATTISON: Your Honor, obviously there isn't any nexus at all between those two things.

12 Obviously the matter involved, subject matter, that is, who drove the car, get-away car, and showing the photos.

THE COURT: I know. I think that --

MR. PATTISON: It's --

THE COURT: The problem of interviewing a defendant represented by counsel in the absence of counsel, even though the Government claims that that was done by permission of counsel, doesn't, it seems to me, give the defendant carte blanche in deciding that certain statements of the defendant may be made available while others may not.

I mean, after all, counsel has to defend this man and I realize it wasn't Mr. Lashley who was the counsel at that time, but it seems to me when Mr. Lashley entered the picture, he would have naturally expected that any statements made by the defendant, whether oral or written, and particularly if the oral ones had been taken down in the course of an interview which pertained to the case as well, would be made available to him.

At least that would be my preliminary feeling about this situation. I am not saying I am deciding the matter. I am just expressing some doubts that --

MR. LASHLEY: Your Honor, there is a reference

13 here in this statement to the bank robbery because it discusses the payment of the $12,000 -- his alleg $12,000 share in the participation in the bank robbery.

It is in the statement of Agent Koletar, which is Government 11 for Identification. And not only was the Government irresponsible -- in not turning this over pertaining to my motion, but they even failed to turn it over after Agent Koletar testified on direct examination of the Government's case under 3500, which is clearly -- they had to do the turning.

The statement made by the defendant affecting made to Agent Koletar who was a witness in this case, I still didn't get it after Agent Koletar testified on direct examination on the Government's case.

So I think the Government --

MR. PATTISON: Your Honor --

MR. LASHLEY: -- was in error in not turning it over based on my formal motion under Rule 16 and subsequently after the trial started, after Agent Koletar testified on direct under Rule 3500.

It was highly prejudicial in defense of my case.

14 MR. PATTISON: Your Honor, obviously this is not subject to Rule 3500. That isn't even close.

THE COURT: I am not talking about 3500.

MR. PATTISON: Yes. I believe that was the point which he just made now, that he felt that it should have been turned over before the cross of Agent Noletar on our own case.

Clearly this is not the subject matter of the agent's direct evidence, testimony, which is what 3500 is.

THE COURT: Yes. But I don't really thing that you can rely upon that kind of limitation. It seems to me that if there is a writing prepared by a Governmental agent -- and my recollection is that Rule 3500 speaks of anything that is recorded.

MR. LASHLEY: By the witness or by the defendant, I believe, your Honor.

THE COURT: Yes.

MR. LASHLEY: Here it is both ways. It is the witness recording and it involves the defendants admissions.

MR. PATTISON: I believe the rule also states a limitation concerning the subject matter of the direct testimony.

THE COURT: The term "statement," which is

15 3500-E, as used in the previous sub-sections in relation to any witness called by the U. S., means a written statement made by said witness and signed or otherwise adopted or approved by him; (2) A stenographic, mechanical, eletrical or other recording or transcription thereof, which is a substantial verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement or (3) A statement however taken or recorded or a transcription there of if any made by such witness to a Grand Jury.

It does seeme to me --

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MR. PATTISON: Your Honor, I believe in the earlier part of 3500, it has that limitation, which I mentioned.

THE COURT: You mean, division (b),"After a witness called by the U. S. has testified on direct examination, the Court shall order the U.S. to produce any statement as hereinafter defined." -- that means as I've just read it -- "of the witness in the possession of the U. S. which relates to the subject matter"--

MR. PATTISON: Yes.

THE COURT: --as to which the witness has testified."

MR. PATTISON: Yes, that is it.

THE COURT: "If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use."

As I said before, a statement means anything the fellow wrote, and the question really is, if it pertains to the subject matter of the testimony of the witness.

Well, the subject matter of the testimony of this witness were discussions with this defendant.

MR. PATTISON: Concerning the robbery of the

bank.

THE COURT: Well, as Mr. Lashley has just pointed out, since I have not myself seen the statement -- and I wouldn't see it because it's not in evidence -- it does contain a statement with regard to statements about disposal of $12,000 representing the bank burglary loot.

So I think there is -- there could be a fair argument made that that is pertinent. That's under 3500. But I mean, under -- I think the more important rule here, if I am not mistaken, would be Rule --

MR. LASHLEY: 16.

THE COURT: -- 16, which has to do with statements by the defendant and I think those statements -- yes, Rule 16, subdivision (1), written or recorded statements or confessions made by defendant, the existence of which is known or in the exercise of due diligence may become known to the attorney for the Government.

Now, my belief is that"recorded here"means written, written or otherwise incorporated in paper or on tape or in any physical manner whatsoever.

MR. PATTISON: Your Honor, I believe that the case law following that limits it to a largely verbatim account, not a witness' summary.

3 THE COURT: Well, I am going to give you an opportunity.

MR. PATTISON: Written a week later.

THE COURT: I am going to give you an opportunity to submit a memo to the Court on that and I will give you an opportunity independently to bring to the Court's attention any authority that you feel sustains your viewpoint on the matter.

MR. PATTISON: Your Honor, for our purpose of writing this brief, may I ask that this be offered in evidence, at this time?

I think it hard to argue it without --

THE COURT: I think it should be marked as a Court exhibit.

MR. PATTISON: Court Exhibit in evidence for the purpose of our being able to talk about it, comment on it.

THE COURT: Is there another one?

MR. LASHLEY: No.

THE COURT: You have reference to some other statement, however.

Do you remember there was another statement?

MR. LASHLEY: Yes.

MR. PATTISON: May 26, which was not offered in evidence.

MR. LASHLEY: I think this should be a Court Exhibit, too, your Honor.

This relates to the same conversation on the same day.

THE COURT: Yes.

I think that will definitely have relationship to the problem we are discussing with respect to Court Exhibit 1 so make that Court Exhibit 2.

THE CLERK: Yes, your Honor.

MR. LASHLEY: One further point, your Honor. I was not able to defend the statement of Agent Koletar, the three-page statement concerning narcotics and the one reference to the $12,000, at the Miranda hearing because we never knew the existence of it and this statement also would have been one of the statements which your Honor would have ruled on at the Miranda hearing.

But we didn't have it before us. I didn't think of its existence. Therefore, it could not be an issue at that Miranda hearing. Only the statement -- the one-page statement, signed by Mr. Johnson was in issue at that Miranda hearing. Not this three-page statement.

THE COURT: Yes.

MR. PATTISON: Your Honor, may I just make

a few points relative to that? Number one, it was not the subject matter of the actual case and it was not offered into evidence.

In other words, we are talking about a moot point. Academic, whether it was the subject of the prior suppression hearing or not. We chose not to use it.

Therefore, it has the same effect.

THE COURT: I know. I have to say that I don't think you can be the sole judge of that decision, the validity of that decision.

MR. PATTISON: The suppression hearing issue?

THE COURT: Perhaps I don't understand you. I am not saying with respect to that May 26 handwritten statement, I am not talking about that.

MR. PATTISON: Yes.

THE COURT: But I am talking about the other one that's now, I believe, Court Exhibit 1. I don't think that a decision by the Government not to use a statement made by the defendant which has been recorded by a Government agent necessarily immunifies it from turnover as a statement of the defendant where it pertains to the case.

MR. PATTISON: If it pertains to the case.

THE COURT: Well, I'd have to say from what I

heard here, it clearly --

MR. PATTISON: Which is a judgment.

THE COURT: -- it clearly has pertinence to the case.

Now, the question -- while I think of it, that I believe to be particularly your responsibility, Mr. Lashley, to deal with, would be, assuming that this document should have been turned over at some earlier stage, is that in and of itself sufficient ground for dismissal.

MR. LASHLEY: I believe it is, your Honor.

MR. PATTISON: Your Honor, may I add one other point to that?

Mr. Lashley said that the first time he ever heard of this was just now. May I cite the record of the prior hearing, Mr. Johnson's -- Mr. Johnson's testimony at page 181, wherein he dealt with this interview concerning drugs and wherein he said that he told the agent, "I shot up the money in drugs, I owe a lot of people money."

And he said, "Who are the people that you owe money?"

I said, "Organized crime figures, gangsters."

THE COURT: What transcript are you referring to?

MR. PATTISON: Page 181, the transcript of

7 May 16, 1973. "He wrote it all down,"Mr. Johnson said, meaning the agent, Koletar. "He asked me the price of drugs, in large quantities."

THE COURT: Let's see.

MR. PATTISON: Page 181.

THE COURT: Yes. This is on his direct testimony.

MR. PATTISON: Yes.

THE COURT: Well --

MR. PATTISON: So to say that --

MR. LASHLEY: That statement --

MR. PATTISON: Please.

MR. LASHLEY: It's not relevant to the statement which is Court Exhibit 1. It's not the same -- doesn't say the same thing.

MR. PATTISON: What do you mean?

MR. LASHLEY: His statement on page 181 of this record would not have given me any indication that the Government had this statement in their possession.

MR. PATTISON: He said that he wrote it all down, about who are the people that you owe money, He, meaning the agent.

So, I mean, the only reason why I bring it up your Honor, is that it is not quite --

THE COURT: When was the formal motion served?

MR. PATTISON: As --

MR. LASHLEY: It was returnable, your Honor, on April 13, 1973.

THE COURT: So it was prior to this hearing?

MR. LASHLEY: Yes.

THE COURT: Well --

MR. PATTISON: Your Honor, may I say also that the actual prejudice shown here is nil. The agent was available.

THE COURT: That's an argument.

MR. PATTISON: For total cross-examination on this point, on anything about it.

THE COURT: Except that --

MR. PATTISON: I fail to see any prejudice.

THE COURT: Except that what I read here, in the light of what has been said about the statement that's now Court Exhibit 1, would lead me to believe that it would have been important for Mr. Lashley to find an opportunity to see that statement, to see what that statement said.

The agent has testified that certainly he took what was said here as something that warranted preserving in this form and transmitting to other agencies. He didn't think of it as pure cock and bull.

MR. PATTISON: That's correct.

9 THE COURT: Now, that was -- hardly seems possible to think. So much time has passed, a year and several months ago; at the time this motion was made would have been a year and a half ago, and even thought there was reference to, he wrote it all down, I don't -- at this later hearing, I don't think that that necessarily means that the defense had waived its right to believe that this was now excluded from its motion to turn over all statements of the defendant.

That's --

MR. PATTISON: I am not saying that, your Honor. I only raise it as a factor which I think mitigates on the issue of prejudice.

THE COURT: You can make that argument.

MR. PATTISON: And surprise.

THE COURT: I'll have to weigh it against arguments of the other side with respect to what the effect of this might be in this case. You'd said you wanted to discuss these various motions before you came to your main motion.

MR. LASHLEY: The main motion, your Honor, is at this time the defendant moves for a judgment of acquittal on the grounds that the Government has failed to prove the defendant's guilt beyond a reasonable

doubt.

There is no testimony in this trial at all from any witnesses that Mr. Johnson was in the bank, that he ever participated in this bank robbery. There is no independent testimony from any alleged participants in the bank robbery that Mr. Johnson was involved with them in any bank robbery.

We have three counts here, including a conspiracy count, which is Count 3. There is absolutely no testimony by any co-conspirators or accomplices in this case that Mr. Johnson either participated in the bank robbery itself or participated in the conspiracy to commit the offense of robbing the Kings Lafayette Bank at 650 Fulton Street in Brooklyn, on February 29, 1972.

There are no photographs in evidence showing that Mr. Johnson was in the bank or near the bank at the time of the robbery and the only thing in evidence are statements signed by Mr. Johnson which testimony will show are not in his own handwriting.

None of the factual parts of the -- any of the statements in evidence are in Mr. Johnson's own handwriting. The only thing is Mr. Johnson admitted he signed those statements and on one or two of those statements he wrote above the signature, "I have

11 read the above statement." Nothing factual in anything that Mr. Johnson signed.

Testimony is that he never read any of the statements that he signed and based on all of these facts, your Honor, I move for a judgment of acquittal on the grounds that the Government has failed to prove their case here beyond a reasonable doubt.

MR. PATTISON: Your Honor, may I just answer that? Just briefly? I think that the types of evidence which Mr. Lashley points out as having been offered here are of a type which I think the Court can take notice of are less reliable than the evidence which was in fact offered, an eyewitness, an alleged eyewitness identification some two and a half years after the crime involved or the testimony of a person with whom some sort of deal has been made out, made with, and therefore subject to a full probing cross-examination concerning motive to lie, etc..

The problems concerning an eyewitness identification are so legion and are the subject of enough legal writing to fill many books. I think that courts have always held that the type of -- that the type of evidence which was offered, an admission voluntarily made, is far more reliable than any other type of evidence.

12 THE COURT: Well, I suppose even Mr. Lashley would not dispute the force of an admission voluntarily made.

MR. LASHLEY: No, your Honor.

THE COURT: Basically, as I understand it, your position is that what the defendant signed, he signed under circumstances that should be not considered voluntary, isn't that the --

MR. LASHLEY: It's more than that.

THE COURT: Well --

MR. LASHLEY: The fact that he says he never read the statements.

THE COURT: Well, we are talking about not just the statement. We are talking about what the statement imports, an admission of guilt, a confession, in effect.

MR. LASHLEY: Right.

THE COURT: Right? So that it comes down to whether under all the circumstances as they now stand the Court can conclude beyond a reasonable doubt that Mr. Johnson placed his signature on these several exhibits that are in evidence, including even photographs, on the backs of photographs, right?

MR. LASHLEY: Yes. Except --

THE COURT: Both -- I realize the photographs

can't be considered confessions, but might tend to be regarded as corroborative evidence of the confession, to the extent that they are independent circumstantial proof that there were people, other people connected with this affair, whose role Mr. Johnson was familiar with and could only have been familiar with if he had indeed been a participant.

That's,I think, really what the thrust of the Government's case is. But to get back to the -- as I say, your position basically is that under all the circumstances revealed here, the Court cannot find, beyond a reasonable doubt, that the defendant -- that the defendant's signature carries with it the full implication that he knowingly and voluntarily confessed to participation in this crime because in fact he did? Do you understand what I mean?

MR. LASHLEY: Yes.

THE COURT: That's what it really gets down to.

MR. LASHLEY: Yes.

THE COURT: Well, now, I feel that since I've gotten part of the record, I should get the rest of it, and how much time will each of you like to have for the submission of some memoranda on these questions of law?

MR. PATTISON: Ten or so days. Ten days I think would be enough.

THE COURT: Ten days; do you mean two weeks?

MR. LASHLEY: Yes, your Honor.

MR. PATTISON: Not really, but maybe two weeks would be a better time.

THE COURT: All right. I'll give you two weeks.

MR. PATTISON: Very well.

MR. LASHLEY: Your Honor, will the Government please supply me with photocopies of Court Exhibits 1 and 2?

THE COURT: I was going to ask you first, until the briefs are submitted, do one or the other of you wish to retain these exhibits and submit them at that time and provide Mr. Lashley with the copies?

MR. LASHLEY: It's the Government's Exhibits, if they will just furnish me with photocopies of 1 and 2, Court Exhibits.

THE COURT: Whatever they will. I will expect at the time of the submission of the briefs, that someone will submit a folder with all the exhibits that have been marked.

MR. PATTISON: You have this. Hes, I will.

MR. LASHLEY: Mr. Pattison has all the exhibits.

15 THE COURT: Includint the two court exhibits which I am turning over to the custody of Mr. Pattison for the time being.

MR. PATTISON: Very well, your Honor.

THE COURT: All right. I think at the moment then there is --

MR. LASHLEY: Decision reserved at this time?

THE COURT: Decision is reserved, right, on the motions.

MR. LASHLEY: Thank you.

MR. PATTISON: Very well, your Honor.

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